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APPELLATE PROCEDURE / INTERNATIONAL LAW—
UNITED STATES v. KIRBY: THE CASE FOR APPELLATE REVIEW OF
GRANTS OF BAIL BY DISTRICT COURT JUDGES IN INTERNATIONAL
EXTRADITION CASES

INTRODUCTION

Currently, appellate review is not available when bail is granted by district court judges in international extradition cases.¹ Review is not available because before a court can hear and decide any case, it must have jurisdiction,² and there is no explicit grant of jurisdiction to the federal courts of appeals to provide review of grants of bail by district court judges in international extradition cases.

Recently, however, the United States Court of Appeals for the Ninth Circuit undertook review of a grant of bail in an international extradition case, setting forth a theory of jurisdiction that confers on the federal courts of appeals the power to undertake this review.³ In *United States v. Kirby*,⁴ Terence Damien Kirby, Pol Brennan, and Kevin Artt were potential extraditees⁵ who came to the United States after escaping from the Maze Prison in Belfast, Northern Ireland.⁶ While awaiting extradition hearings,⁷ the

1. See *infra* note 192 for citations to cases where courts undertook review of grants of bail in international extradition cases without justifying their jurisdictional basis.

2. See *Hagans v. Lavine*, 415 U.S. 528, 538 (1974) (stating that jurisdiction is the authority conferred by Congress to decide a case); see also *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

3. See *United States v. Kirby*, 106 F.3d 855 (9th Cir. 1996). The *Kirby* court was the first to explain the jurisdictional basis for its review. See *infra* Part II.B.2 for a discussion of the majority's theory of jurisdiction.

4. 106 F.3d 855 (9th Cir. 1996).

5. The United Kingdom had requested extradition of all three from the United States. See *id.* at 857.

6. See *id.*; see also Sandra L.M. Gosser, *In re Requested Extradition of Artt, Brennan, and Kirby: Counterterrorism and the Court*, 6 TUL. J. INT'L & COMP. LAW 633, 633-34 (1998) (providing additional background material regarding the massive prison break at the Maze Prison in 1983 during which Kevin Artt, Pol Brennan, and Terence Kirby escaped).

7. It is important to note that a bail decision made in an international extradition

United States District Court for the Northern District of California granted bail to all three.⁸ The United States sought appellate review of these bail decisions on behalf of the United Kingdom.⁹ However, the extradition treaties between the United States and the United Kingdom did not explicitly provide appellate jurisdiction to the federal courts of appeals to review these bail decisions.¹⁰

The Ninth Circuit, in *Kirby*, was the first to explain the jurisdictional basis of the federal courts of appeals to review grants of bail by district court judges in international extradition cases.¹¹ The majority concluded that jurisdiction existed to hear the appeal because 28 U.S.C. § 1291¹² grants appellate jurisdiction to the courts of appeals to review all final decisions of the district courts.¹³ The dissent, however, concluded that jurisdiction did not exist to hear the appeal because the bail decision was neither final, nor a decision of the "court."¹⁴

This Note explores the issue of whether appellate jurisdiction exists for the federal courts of appeals to review grants of bail by federal district court judges in international extradition cases. Part I provides a summary of the extradition process and the granting of bail within that process. This section also contrasts the lack of review of grants of bail made in international extradition cases with the statutory right of the government to appeal grants of bail in domestic criminal cases. Part I also discusses the history of the final judgment rule, now embodied in 28 U.S.C. § 1291, which defines the appellate jurisdiction of the United States Courts of Appeals. Finally, Part I explains several avenues of review that circumvent the finality requirement of § 1291. Part II reviews the Ninth Circuit's decision in *Kirby*, including a discussion of both the majority and dissenting opinions. Part III analyzes the arguments made in *Kirby* in regard to whether jurisdiction exists in the courts of appeals to review bail decisions in extradition cases. Part III then ar-

case is but one decision to be made in the extradition process. See *infra* Part I.A for a discussion of the extradition process.

8. See *Kirby*, 106 F.3d at 858.

9. See *id.*

10. Extradition Treaty, June 8, 1972, U.S.-U.K., 28 U.S.T. 227, as modified by the Supplementary Treaty Concerning the Extradition Treaty, June 25, 1985, U.S.-U.K., T.I.A.S. No. 12050.

11. See *Kirby*, 106 F.3d at 858.

12. Section 1291 states that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. § 1291 (1994).

13. See *Kirby*, 106 F.3d at 859-61.

14. See *id.* at 866-67 (Noonan, J., dissenting).

gues that the Ninth Circuit could have relied on the collateral order doctrine¹⁵ to establish a jurisdictional basis for appellate review of grants of bail made by district court judges. Part III further argues that the Supreme Court should use its rule-making power, found in 28 U.S.C. §§ 2072(c)¹⁶ and 1292(e),¹⁷ to define finality and thereby eliminate the confusion surrounding whether a decision is appealable.

I. BACKGROUND

A. *International Extradition*

Before deciding whether a grant of bail given by a federal district court judge during the international extradition process is appealable to the United States Courts of Appeals, it is necessary to understand the international extradition process.¹⁸ By doing so, an informed decision can be made as to what role the bail decision plays in the extradition process and whether the bail decision is reviewable.

1. The Process of International Extradition

Extradition is “the surrender by one nation to another of an individual accused or convicted of an offence [sic] outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender.”¹⁹ The international extradition process begins with a treaty between two sovereign nations²⁰ and is further controlled by federal stat-

15. The collateral order doctrine provides for appellate review of non-final orders that conclusively determine a disputed question, resolve an important issue completely separate from the merits, and are effectively unreviewable on appeal from a final judgment. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). See *infra* Part I.C.4.c for a thorough discussion of the collateral order doctrine.

16. Rules Enabling Act, 28 U.S.C. § 2072(c) (1994).

17. Federal Courts Study Implementation Act, 28 U.S.C. § 1292(e) (1994).

18. See generally Lis Wiehl, Article, *Extradition Law at the Crossroads: The Trend Toward Extending Greater Constitutional Procedural Protections to Fugitives Fighting Extradition from the United States*, 19 MICH. J. INT'L L. 729 (1998) (describing the historical evolution of United States extradition law, discussing recent court holdings that the federal extradition scheme violates the Fourth Amendment, and arguing that the international extradition process may be undermined if further procedural protections continue to be added to the process).

19. *Terlinden v. Ames*, 184 U.S. 270, 289 (1902).

20. See *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933) (stating that under United States law the legal right to demand extradition is only created by treaty, otherwise it rests on comity); *United States v. Rauscher*, 119 U.S. 407, 411-12 (1886) (stating that delivering fugitives apart from any treaty obligation has never been recognized).

utes.²¹ Generally, the international extradition process begins when a requesting nation files a verified complaint²² with the United States government charging that the person sought committed one or more of the crimes listed in the extradition treaty.²³

An extradition request must satisfy the terms of the applicable treaty. For example, a treaty may require that certain documents supporting the extradition request be provided, including: copies of the formal charge against the accused, the order for the accused's arrest, the relevant criminal statutes, and other evidence from which the accused may be identified, such as fingerprint cards or photographs.²⁴ To be successful, the request for extradition must contain sufficient evidence showing probable cause to believe that an extraditable offense was committed by the person sought.²⁵ Assuming that the terms of the treaty have been met, the judicial body²⁶ will issue a warrant for the arrest of the accused.²⁷ Once the accused is brought into custody pursuant to the arrest warrant, an

The typical extradition treaty provides a list of offenses which warrant extradition, a list of conditions which will prevent extradition, general procedural guidelines governing how requests are to be made and what documentation must support requests, and a provision governing "provisional arrest," which allows for the immediate arrest of the accused in cases where there is a high likelihood that the accused will flee the requested nation before the requested nation receives the necessary supporting documentation. See, e.g., Extradition Treaty, *supra* note 10.

21. See 18 U.S.C. §§ 3181-3196 (1994 & Supp. II 1996).

22. See *id.* § 3184 (1994 & Supp. II 1996). The complaint must be made under oath. See *id.*

23. See *id.* For further discussion of the extradition process, see M. CHERIF BAS-SIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE (3d ed. 1996); see also M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 727-1122 (1968) (describing the extradition process); Jefferey A. Hall, Note, *A Recommended Approach to Bail in International Extradition Cases*, 86 MICH. L. REV. 599, 601-03 (1987) (describing the extradition process).

24. See Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 76 AM. J. INT'L L. 154, 157 (1982). Most treaties entered into by the United States require evidence that would either justify committing the accused for trial had he committed the crime in the United States or would show that the accused has already been convicted of the crime in the requesting country. See *id.* at 158.

25. See 18 U.S.C. § 3184 (1994 & Supp. II 1996); see also *Pettit v. Walshe*, 194 U.S. 205, 217 (1904) (stating that the evidence must be sufficient to authorize arrest and commitment for trial according to the law of the place where the arrestee was found); *Caltagirone v. Grant*, 629 F.2d 739, 744 (2d Cir. 1980) (stating that probable cause is required for a provisional arrest and that the mere existence of Italian arrest warrants is not enough to establish probable cause).

26. The judicial body in an extradition proceeding may be "any justice or judge of the United States, or any magistrate . . . authorized to do so by a court of the United States, or any judge of a court of record of general jurisdiction of any State . . ." 18 U.S.C. § 3184 (1994 & Supp. II 1996).

27. See *id.*

extradition hearing will be held to determine if he will be extradited.²⁸

An extradition hearing is not a full trial on the merits.²⁹ Rather, during the extradition hearing the judicial body first determines whether the extradition request is within the bounds of the treaty between the requesting nation and the United States. Following this conclusion, the court must then decide whether there is enough evidence to require surrender of the accused to the requesting nation.³⁰ When making this determination, the judicial body does not determine whether the accused is guilty or innocent.³¹ Rather, the judicial body only asks whether probable cause exists to believe the accused committed the offense charged, or whether the accused has already been convicted of the offense in the other nation.³² If the judicial body makes an affirmative determination with regard to either question, the accused will be certified for extradition.³³ Before certification, however, the accused may introduce any "defense" he or she may have against extradition.³⁴

28. See *id.*; see also BASSIOUNI, *supra* note 23 at 655.

29. See *Charlton v. Kelly*, 229 U.S. 447, 461 (1913) ("The proceeding is not a trial."); see also *Benson v. McMahon*, 127 U.S. 457, 463 (1888) ("[T]he proceeding before the [judicial body] is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him . . .").

30. See 18 U.S.C. § 3184 (1994 & Supp. II 1996) (stating that the judicial body will determine whether the evidence is sufficient to sustain the charge under the provisions of the applicable treaty); see also *Collins v. Loisel*, 259 U.S. 309, 314-16 (1922) (stating that an extradition hearing merely decides whether there is competent evidence which, according to the law of the surrendering nation, would justify the accused's apprehension and commitment for trial if the crime had been committed in the surrendering nation); BASSIOUNI, *supra* note 23, at 655-56.

31. See *Collins*, 259 U.S. at 314-15 (stating that it is not the function of the committing magistrate to determine the guilt or innocence of the potential extraditee); *Charlton*, 229 U.S. at 461 (explaining that the issue in an international extradition hearing is limited to whether the evidence is sufficient to make it proper to hold that party for trial); *In re Extradition of D'Amico*, 185 F. Supp. 925, 927 (S.D.N.Y. 1960) ("The function of the [judicial body] is not to determine whether the alleged fugitive is in fact guilty of the crime of which he is accused."); BASSIOUNI, *supra* note 23, at 703.

32. See *Ex parte Bryant*, 167 U.S. 104, 105 (1897) (explaining that the requesting nation must show that "there was probable cause to believe him guilty of the crime charged"); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1971) ("The existence of probable cause . . . to believe the accused [is] guilty of the crime charged is essential to the issuance of a commitment [to extradition]."); Hall, *supra* note 23, at 602-03.

33. See 18 U.S.C. § 3184 (1994 & Supp. II 1996). The certification provides that a warrant shall issue for the commitment of the accused to the proper jail until he is surrendered upon demand of the foreign government. See *id.*

34. The Supreme Court has ruled that in an international extradition proceeding the potential extraditee may only submit evidence to rebut the requesting nation's case, as opposed to putting on a full defense. See *Charlton*, 229 U.S. at 461-62 (excluding

If the judicial body determines that the accused is not extraditable, the United States, who acts on behalf of the requesting nation, has no direct route of appeal, but may refile the request to extradite.³⁵ Conversely, if the judicial body determines that the accused is to be certified for extradition, the accused may not appeal in the usual sense, but may obtain limited review of the certification for extradition by way of a writ of habeas corpus.³⁶ Notwithstanding this review, if the accused remains extraditable, the judicial body

evidence of insanity); *United States v. Wiebe*, 733 F.2d 549, 553 n.4 (8th Cir. 1984) (noting that defenses of alibi or insanity may be excluded); *United States ex rel. Petrushansky v. Marasco*, 325 F.2d 562, 567 (2d Cir. 1963) (excluding evidence that contradicts the time of the murder). *But see* John G. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1441, 1468-71 (1988) (debunking the myth that a person sought for extradition may not put on a defense).

Generally, defenses to extradition include a lapse of the statute of limitations for the offense charged, double jeopardy, immunity from prosecution, or a "political offense" exception. *See* Extradition Treaty, *supra* note 10. *See generally* BASSIOUNI, *supra* note 23, at 495-502. Commonly, a "political offense" exception is provided for in the treaty. Usually, this exception bars extradition when the person sought is being persecuted by the requesting nation merely based on his race, religion, nationality, or political opinions, or will be prejudiced at trial or restricted in his liberty because of the same. The "clear and longstanding" definition of a political offense recognizes a political offense to be an "'act[] committed in the course of and incidental to a violent political disturbance such as war, revolution or rebellion.'" *Koskotas v. Roche*, 740 F. Supp 904, 911 (D. Mass. 1990) (quoting *Eain v. Wilkes*, 641 F.2d 504, 518 (7th Cir. 1981)); *see also* *Ornelas v. Ruiz*, 161 U.S. 502, 511 (1896). *See generally* Gosser, *supra* note 6, at 636-40 (discussing the history and case law surrounding the political offense exception); M. Cherif Bassiouni, *The "Political Offense Exception" Revisited: Extradition Between the U.S. and the U.K.—A Choice Between Friendly Cooperation Among Allies and Sound Law and Policy*, 15 DENV. J. INT'L L. & POL'Y 255 (1987) (explaining changes to the political offense exception in the treaty at issue in *Kirby*).

35. *See* *Collins v. Loisel*, 262 U.S. 426 (1923) (holding that an extradition proceeding that ends in the potential extraditee's release from custody does not bar a subsequent extradition demand on the same charge); *In re Requested Extradition of Mackin*, 668 F.2d 122, 128 (2d Cir. 1981) ("The foreign government that is dissatisfied with the results of the hearing must institute a new request for extradition."). Multiple requests for the extradition of the accused must, however, be filed in good faith. *See* *Hooker v. Klein*, 573 F.2d 1360, 1366 (9th Cir. 1978).

36. *See* *Escobedo v. United States*, 623 F.2d 1098, 1101 (5th Cir. 1980) (stating that habeas corpus review of an extradition decision is limited to "'whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty'" (quoting *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925))); *see also* *Shapiro v. Ferrandina*, 478 F.2d 894, 901 (2d Cir. 1973) (recognizing that the magistrate's decision is not appealable, but that the extraditee may obtain review by way of a writ of habeas corpus). *See generally*, BASSIOUNI, *supra* note 23, at 737-49; Hall, *supra* note 23, at 603. Black's Law Dictionary defines *habeas corpus ad subjiciendum* as:

A writ directed to the person detaining another, and commanding him to produce the body of the prisoner, or person detained. This is the most common form of habeas corpus writ, the purpose of which is to test the legality of the

that made the decision to extradite will certify its decision to the Secretary of State, who exercises discretionary review of extradition decisions.³⁷ Following the certification for extradition, the Secretary of State can order the surrender of the accused.³⁸ If surrender does not occur within two months of certification for extradition, the accused may be released.³⁹

2. Bail Decisions During the Extradition Process

Currently, there are no statutory provisions concerning bail in extradition cases.⁴⁰ Rather, the United States Supreme Court, in

detention or the imprisonment; not whether he is guilty or innocent. This writ is guaranteed by the U.S. Const. Art. I, § 9, and by state constitutions.

BLACK'S LAW DICTIONARY 709-10 (6th ed. 1990).

37. See 18 U.S.C. §§ 3184, 3186 (1994 & Supp. II 1996); see also *Escobedo*, 623 F.2d at 1105 & n.20 (stating that a fugitive is not generally entitled to review by the Secretary of State on the propriety of the extradition, but that the Secretary of State always has discretion to refuse to extradite); *Collier v. Vaccaro*, 51 F.2d 17, 20 (4th Cir. 1931) ("Notwithstanding the discharge of the writ [of habeas corpus], the Secretary of State may review the evidence before the magistrate and decide whether the case presented is one calling for the surrender of the accused to [foreign authorities]."). Typically, the Secretary of State will not deny extradition. See BASSIOUNI, *supra* note 23, at 776; see also Hall, *supra* note 23, at 603 & n.25; Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313, 1328-29 (1962) (noting that in the twenty-one years prior to 1962, the Secretary of State denied extradition after certification only twice). However, the Secretary of State may narrow the terms of the extradition approved by the magistrate. See *Shapiro v. Ferrandina*, 478 F.2d 894, 906 (2d Cir. 1973) ("[W]e have no doubt that the Secretary of State could, if he wished, narrow the terms of extradition approved by the magistrate . . .").

38. See 18 U.S.C. § 3186 (1994) ("The Secretary of State may order the person committed . . . to be delivered to any authorized agent of such foreign government . . .").

39. See *id.* § 3188, which states:

Whenever any person who is committed for rendition to a foreign government to remain until delivered up . . . is not so delivered up and conveyed out of the United States within two calendar months after such commitment . . . any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed . . . may order the person so committed to be discharged out of custody . . .

Id.; see also *In re Extradition of Barrett*, 590 F.2d 624, 626 (6th Cir. 1978) (agreeing with the district court that the two month time period begins to run when the order committing the extraditee to jail to wait for extradition is entered, but also recognizing that the enforcement language of the statute is not in mandatory terms).

40. See *In re Extradition of Rovelli*, 977 F. Supp. 566, 567 (D. Conn. 1997) (relying on *Wright v. Henkel*, 190 U.S. 40 (1903), for the power to grant bail in special circumstances); *In re Extradition of Sutton*, 898 F. Supp. 691, 693-94 (E.D. Mo. 1995) (recognizing that federal statutes governing extradition do not include a bail provision, that the Bail Reform Act does not apply to international extradition cases, and that courts must instead rely on federal common law); see also Nathaniel A. Persily, Note, *International Extradition and the Right to Bail*, 34 STAN. J. INT'L L. 407 (1998) (explain-

Wright v. Henkel,⁴¹ vested the power to grant bail in international extradition cases with the courts.⁴² The standard set forth by the Court in *Wright v. Henkel* allows bail requests to be granted in international extradition cases only where "special circumstances" exist.⁴³

ing the development of the right to bail in international extradition cases and arguing that federal legislation should be used to clarify the federal courts' power to grant bail).

41. 190 U.S. 40 (1903).

42. See *id.* at 63 ("[W]e are unwilling to hold that the Circuit Courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief."); *In re Mitchell*, 171 F. 289, 289 (S.D.N.Y. 1909) (stating that the power to grant bail should be exercised only in "most pressing circumstances"); see also Kester, *supra* note 34, at 1447-50 (debunking the myth that bail is not available in international extradition cases).

Many times a magistrate judge presides over extradition hearings, including ruling or adopting findings on the issue of whether bail should be granted. See *In re Extradition of Russell*, 805 F.2d 1215, 1216 (5th Cir. 1986) (denying bail); *In re Extradition of Morales*, 906 F. Supp. 1368, 1370 (S.D. Cal. 1995) (same); *In re Extradition of Sidali*, 868 F. Supp. 656, 659 (D.N.J. 1994) (same); *In re Extradition of Heilbronn*, 773 F. Supp. 1576, 1576, 1582 (W.D. Mich. 1991) (same). But see *United States v. Taitz*, 130 F.R.D. 442, 443 (S.D. Cal. 1990) (admitting bail).

43. See *Wright*, 190 U.S. at 63; see also *Salerno v. United States*, 878 F.2d 317, 317 (9th Cir. 1989) ("Examples of such circumstances include the raising of substantial claims upon which the appellant [extraditee] has a high probability of success [in avoiding extradition], a serious deterioration of health while incarcerated, and unusual delay in the appeal process."); *Hu Yau-Leung v. Soscia*, 649 F.2d 914, 920 (2d Cir. 1981) (finding special circumstances and granting bail where the extraditee was a juvenile and no suitable holding facility could be found); *Morales*, 906 F. Supp. at 1374-75 (finding special circumstances and granting bail when, after being held for six months, the United States dismissed the original complaint at the request of the foreign government, and then filed a new complaint, thereby delaying conclusion of the matter); *Taitz*, 130 F.R.D. at 445-47 (finding special circumstances and granting bail where the absence of flight risk was added to the need for lengthy hearings, the lack of a criminal record, severe allergies that would be adversely affected by custody, an inability to carry out religious rituals at the correctional facility, and a lack of diplomatic necessity for denying bail).

The "special circumstances" standard is relatively strict. See *In re Extradition of Mainero*, 950 F. Supp. 290, 294 (S.D. Cal. 1996) ("A person subject to international extradition may overcome the presumption against bail by presenting clear and convincing evidence demonstrating 'special circumstances' justifying release . . .") (quoting *In re Extradition of Nacif-Borge*, 829 F. Supp. 1210, 1215 (D. Nev. 1993)); *In re Mitchell*, 171 F. at 289 (stating that the power to grant bail "should be exercised only in the most pressing circumstances," as in this case where the extraditee was arrested on the eve of a civil case involving his entire fortune). As a result, many times courts deny bail when the circumstances are not deemed special enough to warrant bail. See, e.g., *United States v. Kin-Hong*, 83 F.3d 523, 524-25 (1st Cir. 1996) (stating that the record does not establish either probability of success or likelihood of protracted extradition proceedings due to impending change in sovereignty in Hong Kong); *In Re Extradition of Russell*, 805 F.2d at 1217 (denying bail despite pending civil litigation, complexity of the pending extradition proceedings, criminal trial in Columbia, no risk of flight, and

When a bail request is denied either by a magistrate or a judge, the potential extraditee may seek release through the use of a writ of habeas corpus.⁴⁴ Conversely, when a bail request is granted, if it is granted by a magistrate as opposed to a district court judge, appeal by the United States on behalf of the requesting country lies to the district court.⁴⁵ However, if the bail request is granted by a district court judge, the United States, acting on behalf of the re-

potentially severe financial and emotional hardship on extraditee and his family); *United States v. Leitner*, 784 F.2d 159, 161 (2d Cir. 1986) (denying bail despite slow arrest by treaty parties, where potential extraditee had already been detained for one month and was entitled to his liberty after sixty days of detainment absent proper documentation and requirements for extradition); *United States v. Williams*, 611 F.2d 914, 915 (1st Cir. 1979) (denying bail notwithstanding the fact that the accused's brother, who faced an extradition hearing on the same charge, was released in another district); *In re Extradition of Rovelli*, 977 F. Supp. at 569-70 (denying bail notwithstanding the fact that Swiss authorities chose not to extradite the extraditee's mother on a similar charge, the extraditee claimed a need to consult with his attorneys, and the extraditee's willingness to convert his home into a secure detention facility and wear an electronic monitoring device); *In re Extradition of Sutton*, 898 F. Supp. at 694-95 (denying bail despite delay, lack of risk of flight, and fact that offense was bailable in the country requesting extradition); *In re Extradition of Siegmund*, 887 F. Supp. 1383, 1386-87 (D. Nev. 1995) (denying bail despite no flight risk, bailable offense in requesting country, nature of offense [fraudulent bankruptcy], and possibility that extraditee was in custody for ninety days while awaiting extradition); *In re Extradition of Sidali*, 868 F. Supp. at 658-59 (denying bail after finding that probability of success in avoiding extradition at hearing and extraordinary personal character were outweighed by the gravity of the offense); *In re Extradition of Rouvier*, 839 F. Supp. 537, 541-42 (N.D. Ill. 1993) (denying bail notwithstanding current ties to United States, heart condition, no risk of flight, claim that statements made to American court regarding extraditee's foreign criminal action were false, and extraditee's compliance with all required legal procedures when he left France); *In re Extradition of Hamilton-Byrne*, 831 F. Supp. 287, 290-91 (S.D.N.Y. 1993) (denying bail despite health problems that were not so unique that they could not be dealt with in custody); *In re Extradition of Heilbronn*, 773 F. Supp. at 1581-82 (denying bail despite no flight risk, delay allegedly caused by Israel, and release would benefit the public because extraditee is a doctor); *United States v. Hills*, 765 F. Supp. 381, 386-88 (E.D. Mich. 1991) (disallowing bail despite absence of flight risk, extraditee's involvement in civil litigation, need to assist his attorney, and constitutional and procedural defenses raised at extradition hearing); *Koskotas v. Roche*, 740 F. Supp. 904, 908 (D. Mass. 1990) (disallowing bail despite extraditee's need to be involved in counsel's preparation for extradition proceedings, ongoing pro se defense in civil action in New York that involved most of his assets, and extraditee's willingness to submit himself to house arrest).

44. See *Leitner*, 784 F.2d at 160 (affirming the decision of the district court to deny habeas relief after magistrate granted bail); *Koskotas*, 740 F. Supp. at 919 (denying habeas relief after magistrate denied bail).

45. See *In re Extradition of Rouvier*, 839 F. Supp. at 537 (hearing emergency motion brought by the United States Attorney when the magistrate granted bail). This Note does not address whether United States District Courts may hear appeals from grants of bail by United States magistrates. Rather, the analysis in this Note is confined to the issue of whether grants of bail by the district courts are reviewable by the courts of appeals.

questing nation, has no avenue to obtain review of the bail decision unless jurisdiction exists in the courts of appeals.⁴⁶

In domestic criminal cases, as opposed to international extradition cases, appellate review of grants of bail was not available until jurisdiction was conferred by federal statute. An examination of the availability of appellate review of bail decisions in domestic criminal cases will prove helpful in understanding this Note's final analysis.

B. *Review of Grants of Bail in Domestic Criminal Cases*

In domestic criminal cases, appellate review of district court decisions is conferred by federal statute. Although uncommon, parties in domestic criminal cases may invoke the jurisdiction provided by 28 U.S.C. § 1291.⁴⁷ More frequently, the government takes criminal appeals pursuant to the Criminal Appeals Act, 18 U.S.C. § 3731.⁴⁸

The provision of § 3731 that is most germane to the issue of

46. See *United States v. Kirby*, 106 F.3d 855, 858 (9th Cir. 1996) (explaining that there is no Supreme Court precedent determining the issue of whether the United States has the right to appeal from a district court order granting bail).

47. 28 U.S.C. § 1291 (1994). See *infra* Part I.C.1 through Part I.C.2 for a detailed discussion of § 1291.

48. 18 U.S.C. § 3731 (1994). Section 3731 provides the following:

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes.

Id. (emphasis added).

whether bail decisions made by district judges in international extradition cases may be reviewed provides the government with the right to appeal an adverse bail decision, i.e. one that releases the defendant on bail, made by a district court judge in a domestic criminal case.⁴⁹ When the bail decision is made in a domestic criminal case by a magistrate, or by any person other than a judge of the court having original jurisdiction, not including a federal appellate court, the government's right to appeal is set forth in 18 U.S.C. § 3145.⁵⁰

Since there is no parallel statutory provision that provides the government with the right to appeal an adverse bail ruling in an international extradition matter, if jurisdiction is to lie, it must be found elsewhere. Hence, an inquiry into the jurisdictional requirement the United States must meet in order to obtain review by the courts of appeals is necessary.

C. *Jurisdiction of the United States Courts of Appeals*

The basic jurisdictional provisions for the federal courts of appeals are presently found within 28 U.S.C. § 1291, which embodies the finality requirement, also known as the "final judgment rule."⁵¹ Section 1291 states that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts."⁵² The following section describes the history of the finality requirement now found in § 1291.

1. History of the Jurisdiction Granted to the Courts of Appeals

The final judgment rule originated in English common law

49. *See id.*

50. 18 U.S.C. § 3145 (1994). The relevant provision of § 3145 provides the following:

(a) REVIEW OF A RELEASE ORDER—If a person is ordered released by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court—

(1) the attorney for the Government may file, with the court having original jurisdiction over the offense, a motion for revocation of the order or amendment of the conditions of release; and

(2) the person may file, with the court having original jurisdiction over the offense, a motion for amendment of the conditions of release.

Id.

51. 28 U.S.C. § 1291 (1994); *see also* Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 353 (1961) (describing finality requirement of § 1291).

52. 28 U.S.C. § 1291 (1994).

where a writ of error⁵³ would provide for review, but only of a final decision.⁵⁴ The Judiciary Act of 1789, which established the United States federal court system, introduced the final judgment rule into the American federal court system.⁵⁵ Three sections of the Judiciary Act contained the language of finality now found in § 1291.⁵⁶

53. A writ of error is:

A writ issued from a court of appellate jurisdiction, directed to the judge or judges of a court of record, requiring them to remit to the appellate court the record of an action before them, in which a final judgment has been entered, in order that examination may be made of certain errors alleged to have been committed, and that the judgment may be reversed, corrected, or affirmed, as the case may require.

BLACK'S LAW DICTIONARY 1610 (6th ed. 1990); *see also* Winchester v. Winn, 29 S.W.2d 188, 190 (Mo. 1930) ("The suing out of a writ of error is the commencement of a new suit to annul and set aside the judgment of the court below and is not a continuation of the suit below to which it relates.").

54. *See* 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3906 (2d ed. 1992); Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 726-29 (1993) ("[T]hat the Americans borrowed the final judgment rule from the English writ of error procedure is a virtual certainty.").

55. *See* Judiciary Act of 1789, 1 Stat. 73 (1789). The final judgment rule as embodied in the Judiciary Act of 1789 can be traced to the English common law where a final decision on an entire matter had to be obtained before appellate review could be had in the form of the writ of error. *See* *McLish v. Roff*, 141 U.S. 661 (1891). In *McLish*, Justice Lamar stated, "[i]t is true that the Judiciary Act of 1789 limited the appellate jurisdiction of this court to final judgments and decrees, in the cases specified. This, however, in respect to writs of error was only declaratory of a well settled and ancient rule of English practice." *Id.* at 665. In fact, the Judiciary Act of 1789 provided for review on writ of error directly to the Supreme Court of "final decrees" in maritime and admiralty cases from federal circuit courts. *See* Judiciary Act of 1789, 1 Stat. 73, §§ 21-22; *see also* WRIGHT ET AL., *supra* note 54, § 3906, at 264 (explaining the origin of the final judgment rule); Carleton M. Crick, *The Final Judgment as A Basis for Appeal*, 41 YALE L.J. 539, 540-44 (1932) (same). *See* generally Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923), for a discussion of the legislative process that enacted the Judiciary Act of 1789.

56. *See* Judiciary Act of 1789, 1 Stat. 73 (1789). The three sections state:

[Section 21: F]rom final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs, an appeal shall be allowed to the next circuit court

[Section 22: F]inal decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court . . . upon a writ of error . . . [a]nd upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court . . . where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed or affirmed in the Supreme Court

[Section 25: A] final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had . . . may be re-

These three sections provided the ability to appeal a district court decision to the circuit court or Supreme Court, but only from a “final decree” in admiralty, or a “final judgment” or “final decree” in law or equity.⁵⁷ The legislative history surrounding the period in which the Judiciary Act was adopted is limited; consequently, the Framers’ reasons for limiting the federal courts’ jurisdiction in this way are unclear.⁵⁸

In 1891, the Evarts Act created the federal courts of appeals.⁵⁹ Similar to the Judiciary Act’s grant of jurisdiction, the Evarts Act granted power to the newly created courts of appeals to review “by appeal or writ of error final decision[s] in the district court.”⁶⁰ The Supreme Court declared that the different terminology, “judgments and decrees” as used in the Judiciary Act and “decisions” as used in the Evarts Act, amounted to the same restriction on appellate jurisdiction.⁶¹ Currently, the finality requirement is codified in 28 U.S.C. § 1291.⁶² The following section describes the difficulty the

examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error

Id.

57. *See id.*

58. *See* 1 ANNALS OF CONGRESS 46 (Joseph Gales ed., 1789). Reports of the debates surrounding the establishment of the court system are very sparse. For example, one report states only that “Mr. Lee, on behalf of the committee therein appointed, reported a bill to establish the judicial courts of the United States.” *Id.* Another report, mirroring others in terms of meagerness, states “[p]roceeded to the second reading of the bill to establish the judicial courts of the United States; and, after progress, adjourned.” *Id.* at 47. *See generally* WRIGHT ET AL., *supra* note 54, § 3906, at 264 (“History provides clear sources for the final judgment requirement, and no clear justification. As a result, history furnishes little useful guide for understanding or applying the requirement today.”); Crick, *supra* note 55, at 548-49 (commenting on sparseness of legislative history); Warren, *supra* note 55, at 49 (explaining that the legislative history from this period is sparse, thereby rendering the Framers’ reasons for limiting the courts of appeals’ jurisdiction elusive).

59. *See* Evarts Act, ch. 517, 26 Stat. 826 (1891). Section 2 of this Act created the federal courts of appeals and provided for the appointment of an additional circuit judge in each circuit. *See id.* § 2. The newly created courts of appeals were to be composed of three judges who would be drawn from the existing judgeships. *See id.* The Judicial Code of 1911 formally abolished the old circuit courts. *See* Act of March 3, 1911, ch. 231, § 289, 36 Stat. 1087, 1167. The Judicial Code also provided for judgeships so that the newly created courts of appeals would be staffed with its own judges. *See id.* § 118.

60. *See* Evarts Act, 26 Stat. at 828, § 6.

61. *See Ex parte Tiffany*, 252 U.S. 32, 36 (1920). In *Ex parte Tiffany*, the Supreme Court stated “[t]he words: ‘final decisions in the district courts’ mean the same thing as ‘final judgments and decrees’ as used in former acts regulating appellate jurisdiction.” *Id.*

62. 28 U.S.C. § 1291 (1994).

courts have encountered when interpreting the finality requirement.

2. Defining the Finality Requirement

Discussing the problem of defining the finality required by § 1291, the Supreme Court⁶³ has noted that the cases on finality “are not altogether harmonious.”⁶⁴ While the language of finality had been around for some time, it was not until 1945 that the Supreme Court, in *Catlin v. United States*,⁶⁵ offered a general definition of a final decision.⁶⁶ The Supreme Court proclaimed that a final decision is “one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”⁶⁷ With this authoritative judicial pronouncement, the Court appeared to have defined finality.⁶⁸

Nevertheless, the Court eschewed its own definition whenever necessary to reach the desired result. For example, in *Cohen v.*

63. Many of the opinions that attempt to define finality are found in cases where a party is seeking Supreme Court review of a state court decision. Jurisdiction over these claims, pursuant to 28 U.S.C. § 1257, also hinges on finality. *See* 28 U.S.C. § 1257 (1994) (“Final judgments or decrees rendered by the highest court of a State . . . may be reviewed by the Supreme Court by writ of certiorari. . . .”). However, the Supreme Court apparently considers a “final judgment” to be the same in either § 1257 cases or § 1291 cases, and the Supreme Court often interchanges precedents which have attempted to define this requirement. *See, e.g.,* *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 478 n.7 (1975) (determining whether a state court decision was final for purposes of appeal and citing decisions concerning finality of district court decisions for review by courts of appeals); *Local No. 438 Constr. & Gen. Laborers’ Union v. Curry*, 371 U.S. 542, 549 (1963) (same); *Brown Shoe Co. v. United States*, 370 U.S. 294, 309-11 (1962) (determining what constituted a final judgment within the meaning of the Expediting Act and citing two cases concerning appeals to the courts of appeals under § 1291, and a third concerning an appeal to the Supreme Court under § 1257).

64. *See McGourkey v. Toledo & Ohio Cent. Ry. Co.*, 146 U.S. 536, 545 (1892); *see also Collins v. Miller*, 252 U.S. 364, 370 (1920) (holding that judgment should be final as to all parties, causes of action, and entire subject matter involved before appeal); *St. Louis, Iron Co. v. Southern Express Co.*, 108 U.S. 24, 28 (1883) (reasoning that decree is final for purposes of appeal when it terminates the litigation on the merits and leaves nothing to be done but enforce the decree).

65. 324 U.S. 229 (1945).

66. *See id.* at 233; *see also Martineau, supra* note 54, at 729 (noting surprise that the Court did not “develop a general definition of final judgment” for quite some time, and citing *Catlin* as the case that finally did).

67. *Catlin*, 324 U.S. at 233.

68. *See* John C. Nagel, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence With Discretionary Review*, 44 DUKE L.J. 200, 203-04 (1994) (noting the “battle” between the competing policies for and against interlocutory appeals and acknowledging that the Court “settled” the controversy in favor of precluding interlocutory appeals” with the definition announced in *Catlin*).

Beneficial Loan Corp.,⁶⁹ the Supreme Court permitted the appeal of an order requiring the plaintiff in a stockholder's derivative suit to post security for the reasonable expenses of the defendant if the plaintiff was unsuccessful in the suit.⁷⁰ Surely, this order did not fit into the definition set forth in *Catlin*; however, the *Cohen* Court relied on past cases where the finality requirement was given a "practical rather than technical construction" and proceeded to provide review.⁷¹

In *Gillespie v. United States Steel Corp.*,⁷² the Supreme Court relied on *Cohen* and stressed that "a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case."⁷³ The Court then adopted a balancing approach which required weighing the inconvenience and costs of interlocutory⁷⁴ review against the danger of denying justice by delaying the appeal until after final judgment.⁷⁵ The *Gillespie* doctrine, if adhered to, could have ended much of the debate surrounding the final judgment rule because it gave discretion in determining which orders merit appellate review through the balancing test. However, the doctrine has been criticized.⁷⁶

Attesting to the lack of a concrete definition for "finality," the

69. 337 U.S. 541 (1949).

70. *See id.*

71. *See id.* at 546 (collecting cases).

72. 379 U.S. 148, 152 (1964) ("[W]hether a ruling is 'final' within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and . . . it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality.").

73. *Id.* at 152 (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545 (1949)). *See, e.g.*, *Abney v. United States*, 431 U.S. 651, 658 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950); *Bronson v. LaCrosse & Milwaukie R.R.*, 67 U.S. (2 Black) 524, 531 (1862); *Forgay v. Conrad*, 47 U.S. (6 How.) 201, 203 (1848).

74. The term interlocutory is defined as "[p]rovisional; interim; temporary; not final. Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy." BLACK'S LAW DICTIONARY 815 (6th ed. 1990); *see also In re Merle's Inc.*, 481 F.2d 1016, 1018 (9th Cir. 1973) ("An interlocutory order or decree is one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.").

75. *See Gillespie*, 379 U.S. at 152-53.

76. *See* Randall J. Turk, Note, *Toward a More Rational Final Judgment Rule: A Proposal to Amend 28 U.S.C. § 1292*, 67 GEO. L.J. 1025, 1034 (1979); *see also* Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 118 (1975) ("The Court's opinion in *Gillespie* is astounding for its clouded reasoning and enigmatic conclusions. It is unfortunate that a decision which may repre-

Supreme Court, in 1974, stated that "no verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future."⁷⁷ Yet, despite the problems encountered by the courts when defining finality, the finality requirement remains. Therefore, in order to better understand why the finality requirement and its opposition persist, the following sections explain the benefits of appeals in general, the policies supporting the appealability of final judgments only, and the countervailing policies that support interlocutory appeals.

3. The Value of Appeals in General

Appeals serve a number of positive objectives.⁷⁸ Appeals further the goal of rendering factually and legally correct decisions by adding another layer of scrutiny.⁷⁹ In addition, appeals contribute to a fairer judicial process by allowing review of the constraints placed on a litigant by what would otherwise be an unreviewable court.⁸⁰ The larger debate, however, is centered around the appropriate time for an appeal to be taken. One viewpoint is that appeals should be delayed until after a final judgment has been entered, while the opposing viewpoint is that sometimes interlocutory appeals are necessary.

a. *Policies supporting appeals after final judgment*

Despite the dissatisfaction expressed by some toward the finality requirement, several policies justify its use.⁸¹ The following section describes the policies that support the finality requirement.

sent a truly significant adjustment of the entire philosophy of appealability is so devoid of any persuasive analysis.").

77. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

78. *See Solimine, infra* note 86, at 1175-80 (arguing that less judicial hostility toward interlocutory appeals is needed because interlocutory appeals serve a number of positive goals).

79. *See* J. Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 799 (1989) (arguing that "the justification for appeals is not necessarily the 'correct' result they may produce, but their tendency to encourage reasoned judgment by subjecting it to reexamination"). *But see* Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 606 (1985) (quoting former United States Solicitor General Rex Lee "who stated that 'there is nothing in the Constitution and nothing in common sense that says that decisions of an appellate court are more likely to be right than a district court'").

80. *See* Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 66-67 (1985) (explaining that fairness manifests itself in appeals).

81. *See* Note, *supra* note 51, at 351-53 (describing several policies supporting finality requirement); *see also* Joseph Mitzel, Note, *When is an Order Final?: A Result-*

- i. The finality requirement helps prevent overburdened dockets

While overburdened dockets may not have been a concern in 1789 when the Judiciary Act was first adopted, the finality requirement of § 1291 has been praised as a way of easing the burden on the dockets of the courts of appeals.⁸² The finality requirement reduces the number of appeals by preventing piecemeal review, which is the review of any one decision in a single case before completion of the trial phase.⁸³ Piecemeal review of each decision made within a single case is unnecessary because most decisions can be effectively reviewed after the trial phase is completed.⁸⁴ When all of the issues are then reviewed in one appeal, the number of appeals overall will decline. Consequently, the burden on the dockets of the appellate courts is lessened.

- ii. The finality requirement promotes judicial efficiency

The concern with piecemeal review during the era in which the Judiciary Act was enacted centered around administrative difficul-

Oriented Approach to the Finality Requirement for Bankruptcy Appeals to Federal Circuit Courts, 74 MINN. L. REV. 1337, 1341-42 (1990) (same).

82. Guarding against overburdening was not one of the main concerns in England at the time the rule came into existence. In fact, it was not until 1830 that the United States Supreme Court began to acknowledge the rule for this purpose. Justice Story, in *Canter v. American Insurance Co.*, 28 U.S. (3 Pet.) 307 (1830), stated:

It is of great importance to the due administration of justice, and is in furtherance of the manifest intention of the legislature, in giving appellate jurisdiction to this court upon *final* decrees only, that causes should not come up here in fragments, upon successive appeals. It would occasion very great delays, and oppressive expenses.

Id. at 318.

The *Canter* Court then found that since the circuit court did not address damages, and the party seeking damages did not cross appeal, this issue was "not now open before this court." *Id.*; see also *Forgay v. Conrad*, 47 U.S. (6 How.) 201, 205 (1848) (stating that "it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit"); *United States v. Bailey*, 34 U.S. (9 Pet.) 267, 273 (1835) (finding that repeated appeals would waste resources and cause delay and noting that "Congress did not intend to expose suitors to this inconvenience"). See generally *Crick*, *supra* note 55, at 544, 550.

83. This is especially true in light of the fact that subsequent rulings may moot the requirement of appeal. For example, if a party that would have appealed a ruling then wins the case, he no longer needs the appeal to vindicate his rights. See *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380 (1987); see also *WRIGHT ET AL.*, *supra* note 54, § 3907, at 273-74.

84. See *WRIGHT ET AL.*, *supra* note 54, § 3907, at 272; see also *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964) (balancing "the inconvenience and costs of piecemeal review . . . and the danger of denying justice by delay").

ties, as opposed to overburdened dockets.⁸⁵ Today, the finality requirement increases efficiency in the judicial system by eliminating the delays that would occur if every ruling was subject to interlocutory review.⁸⁶ In addition, the finality requirement aids judicial efficiency by ensuring that the appellate court receives a full record, as opposed to one which is not yet complete.⁸⁷ Also, the finality requirement increases judicial efficiency by keeping counsel as well as the court familiar with the case because the chance of interruptions for appeals is diminished.⁸⁸ Furthermore, the finality requirement promotes efficiency because it decreases the possibility of misplaced evidence, which could occur if piecemeal review were undertaken.⁸⁹

iii. The finality requirement enhances the judicial process

In addition to easing the burden on the courts' dockets and increasing judicial efficiency, the finality requirement enhances the judicial process. A common criticism of interlocutory appeals is that such appeals decrease respect for the trial judge.⁹⁰ The finality requirement lowers the number of interlocutory appeals, thus en-

85. See Crick, *supra* note 55, at 541-43 (discussing the problems of having the "record" in two separate courts at the same time).

86. See *Gillespie*, 379 U.S. at 152-53 (stating that there is a "danger of denying justice by delay"); *Catlin v. United States*, 324 U.S. 229, 234 (1945) (stating that elimination of delay caused by interlocutory review is reason enough to sustain final judgment limitation); CHARLES ALAN WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* 504 (3d ed. 1976) (stating that "[i]nterlocutory appeals add to the delay of litigation"); Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1179 (1990) (stating that "permitting more interlocutory appeals will indeed cause delay of the proceedings").

87. See Crick, *supra* note 55, at 541-43; see also *Johnson v. Jones*, 515 U.S. 304, 309 (1995) (noting that interlocutory appeal "risks additional, and unnecessary, appellate court work . . . when it presents appellate courts with less developed records"); *Luxton v. North River Bridge Co.*, 147 U.S. 337, 341 (1893) (stating "[t]he case is not to be sent up in fragments"); Note, *supra* note 51, at 352 ("A single appeal consolidating all alleged errors also minimizes the appellate court burden by eliminating more than one set of records, briefs and arguments.").

88. See Mitzel, *supra* note 81, at 1342.

89. See *id.* at 1341-42.

90. See *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) ("Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system."); Riyaz A. Kanji, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 YALE L.J. 511, 512 (1990) ("The constant specter of such review would reduce the district judge to a token figure."); Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 661 (1971); Charles A. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 779-80 (1957). But see Paul D. Carrington, *The Power of District Judges and the Responsibility of*

suring continued respect for the trial judge. The finality requirement also enhances the judicial process by highlighting the trial judge as the decision-maker when issues arise at trial.⁹¹ The finality requirement further enhances the judicial process by safeguarding poorer opponents from harassment by richer opponents, who can afford to take endless appeals.⁹²

Despite the many policies supporting the finality requirement, interlocutory appeals also prove beneficial and serve valuable purposes. The following section sets forth the benefits of interlocutory appeals.

b. Policies supporting interlocutory appeals

Interlocutory appeals provide review of decisions that will meld into the final judgment and will be effectively unreviewable, such as a denial of removal to state court or a refusal to grant summary judgment.⁹³ Furthermore, interlocutory appeals aid courts of appeals in supervising trial court actions that may not be reviewable on an appeal from a final judgment.⁹⁴ In light of the above policies, several mechanisms that provide for interlocutory appeals have been created. These mechanisms circumvent the final judgment rule toward the end of allowing interlocutory review. An understanding of these mechanisms is essential to a proper determination of whether bail decisions in international extradition cases may be reviewed. The following section describes mechanisms for obtaining interlocutory review which, by their very nature, bypass the final judgment rule.

Courts of Appeals, 3 GA. L. REV. 507, 513 (1969) ("Only a venal or unduly timid judge should fear or regret review, insofar as the esteem of his office is concerned.").

91. See *Firestone Tire & Rubber Co.*, 449 U.S. at 374 ("[The finality requirement] emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial.").

92. See *Cobbledick v. United States*, 309 U.S. 323, 325 (1940) (recognizing that the finality requirement is a way of "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment"); see also WRIGHT ET AL., *supra* note 54, § 3907, at 272; Wright, *supra* note 90, at 780 (arguing that an injured person of limited means may settle for a smaller recovery of damages rather than wait for an appeal to be determined).

93. See Redish, *supra* note 76, at 98 (explaining that a litigant may be substantially burdened physically, financially, and emotionally in the preparation and conduct of a trial if review, which might negate the need for that trial, is delayed).

94. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 411 (1982) (explaining that a judge who assumes a managerial role exercises broad discretion, enjoying unreviewable discretion in most decisions).

4. Avenues of Review Which Circumvent the Finality Requirement⁹⁵

The following section is comprised of sub-sections that describe avenues of review that circumvent the finality requirement including: (a) 28 U.S.C. § 1292, (b) Rule 54(b) of the Federal Rules of Civil Procedure, (c) the collateral order doctrine, and (d) the All Writs Act.

a. Section 1292

Section 1292 of Title 28 of the United States Code, created by the Interlocutory Appeals Act, consists of several provisions that provide for interlocutory appellate review.⁹⁶ Section 1292(a)(1) grants jurisdiction to the courts of appeals over orders of district courts relating to injunctive relief.⁹⁷ The Supreme Court has limited this section, despite its expansive appearance.⁹⁸ Similarly, § 1292(a)(2) and (3) grant jurisdiction over appeals of interlocutory

95. Other avenues of obtaining interlocutory review that are not discussed in depth in this Note include: the Forgay-Conrad rule, the appeal of attorney fees orders, the appeal of bankruptcy orders, the death knell doctrine, the appeal of stay orders, and provisions set forth in the Federal Arbitration Act that are now codified at 9 U.S.C. § 16 (1994). See Martineau, *supra* note 54, at 734-46. The Forgay-Conrad rule allows appeals when a court orders a transfer of property, yet retains jurisdiction for accounting purposes. See *Forgay v. Conrad* 47 U.S. (6 How.) 201, 204 (1848). The Supreme Court adopted a rule separating appealability of attorney fees from appealability of final judgment on the merits orders in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988). Appeals of bankruptcy orders are governed by 28 U.S.C. § 158(d) (1994), which provides jurisdiction to courts of appeals over "all final decisions, judgments, orders, and decrees" entered by district courts. However, the courts use a flexible approach providing for appeals from non-final orders. See Martineau, *supra* note 54, at 745-46. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), the Supreme Court set forth a narrow exception to the final judgment rule such that any stay of a federal case pending resolution of state court proceedings is immediately appealable. See *id.* at 10. Since both the federal and the state claim involved the same issue, the plaintiff would have been barred from the federal court by res judicata, and as a result would never have been able to pursue the federal claim. See *id.* Finally, § 16 provides for immediate appeal from an interlocutory order that does not favor arbitration. See Federal Arbitration Act, 9 U.S.C. § 16 (1994).

96. Interlocutory Appeals Act, 28 U.S.C. § 1292 (1994).

97. See *id.* § 1292(a)(1). The text of § 1292(a)(1) states that courts of appeals shall have jurisdiction over "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court" *Id.*

98. See *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981) (holding that for an interlocutory appeal to be immediately appealable under § 1292(a)(1), a litigant must show that the order might have serious, perhaps irreparable, consequences and can only be effectively challenged by immediate appeal); *Switzerland Cheese Assoc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23 (1966) (holding that an order denying summary judgment

orders that appoint receivers or refuse to wind up receiverships, and over decrees in admiralty cases.⁹⁹ However, § 1292(a)(2) and (3) do not provide the basis for a significant number of interlocutory appeals.¹⁰⁰

In addition to § 1292(a) and its sub-parts, § 1292(b) provides for discretionary review by the courts of appeals of orders that are deemed by a district court judge to involve “a controlling question of law as to which there is substantial ground for difference of opinion” the resolution of which, in an immediate appeal, “may materially advance the termination of the litigation.”¹⁰¹ Courts of appeals may permit an appeal from an order of this type only if an “application is made to it within ten days after the entry of the order.”¹⁰² In addition, the application for such appeal “shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.”¹⁰³ Although appearing to provide for many interlocutory appeals, § 1292(b) has been construed very strictly, and as a result, is not often the basis for interlocutory review.¹⁰⁴

Section 1292(c) and (d) do not provide means for obtaining interlocutory review by the courts of appeals despite the final judgment rule.¹⁰⁵ Rather, they describe the jurisdiction of the Court of Appeals for the Federal Circuit and the process of appealing proceedings from the Court of International Trade or the Claims Court to the Court of Appeals for the Federal Circuit.¹⁰⁶ Since § 1292(c) and (d) do not concern the jurisdiction of the courts of appeals to review bail decisions in international extradition cases, they are not helpful in resolving this issue. Section 1292(e),¹⁰⁷ on the other

ment, though argued by the plaintiff to be a denial of a permanent injunction, was not appealable within § 1292(a)(1)).

99. See 28 U.S.C. § 1292(a)(2)-(3) (1994).

100. See Martineau, *supra* note 54, at 732.

101. 28 U.S.C. § 1292(b) (1994).

102. *Id.*

103. *Id.*

104. See *Hewitt v. Joyce Beverages, Inc.*, 721 F.2d 625, 627 (7th Cir. 1983) (criticizing a district court that certified an order for appeal and strongly recommending that future district courts adhere to the language of § 1292(b) when certifying); *cf. In re Hamilton*, 122 F.3d 13, 14 (7th Cir. 1997) (recognizing that literal repetition of the statutory criteria in the district court's order of certification is not required, but also stating that it would be a great help . . . if the district court, whenever it certifies a case for an immediate appeal under § 1292(b), explained *why* it thinks the case satisfies the statutory criteria) (citations omitted).

105. See 28 U.S.C. § 1292(c)-(d) (1994).

106. See *id.*

107. See *id.* § 1292(e).

hand, adds an interesting provision that might aid in resolving the controversy over which decisions are appealable.

Section 1292(e) states that "[t]he Supreme Court may prescribe rules, in accordance with section 2072¹⁰⁸ of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d)."¹⁰⁹ Congress added § 1292(e) when it enacted the Federal Courts Administration Act of 1992 and thereby gave the Supreme Court the power to create new categories of interlocutory appeals pursuant to its rule-making power.¹¹⁰

The Supreme Court first received rule-making power to define a "final decision" within § 1291 when Congress amended the above-mentioned § 2072 of the Rules Enabling Act¹¹¹ and added subsection (c) as part of the Federal Courts Study Implementation Act of 1990.¹¹² The Rules Enabling Act grants the Supreme Court the power to make rules pertaining to practice, procedure, and evidence in the district courts and courts of appeals, so long as such rules do not "abridge, enlarge or modify any substantive right."¹¹³ Subsection (c) of the Rules Enabling Act provides that "[s]uch rules may define when a ruling of a district court is final for purposes of appeal under section 1291 of this title."¹¹⁴ While the Supreme Court has been given the power, through the enactment of §§ 1292(e) and 2072(c), to prescribe rules that could clarify the finality requirement, the Supreme Court has not yet exercised this power.¹¹⁵ Notwithstanding this new power, § 1292 provides but one of a number of different ways to obtain interlocutory review in spite of the final judgment rule.

b. Rule 54(b) of the Federal Rules of Civil Procedure

In a multiple party or claim lawsuit, Rule 54(b) furnishes an avenue to appellate review even though the trial phase is not yet

108. See *infra* notes 111-114 and accompanying text for the language of § 2072 of the Rules Enabling Act.

109. 28 U.S.C. § 1292(e) (1994).

110. See Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 101, 106 Stat. 4506.

111. 28 U.S.C. § 2072 (1994).

112. Pub. L. No. 101-650, § 315, 104 Stat. 5104, 5115 (1990).

113. 28 U.S.C. § 2072(a)-(b) (1994).

114. *Id.* § 2072(c).

115. See Nagel, *supra* note 68, at 213-14 ("To date, however, the rulemakers have yet to exercise their powers under either section 1292(e) or section 2072(c).").

complete.¹¹⁶ Rule 54(b) permits the federal court to certify one adjudicated claim or the adjudicated rights of one party as a final decision even if the adjudication of the rest of the merits of the case is ongoing.¹¹⁷ Rule 54(b) enables a judge to enter a final judgment for individual claims in cases with multiple claims or parties.¹¹⁸ However, the district court must first determine whether no just cause exists to delay the entry of a final judgment, which is done on a case-by-case basis.¹¹⁹ The decision to certify is solely within the discretion of the district court judge.¹²⁰ Consequently, Rule 54(b) makes it possible for a litigant to appeal immediately if the issues concerning him or her are determined early.¹²¹ In doing so, this rule gives certainty to the appellant that his or her claim is final and may be appealed.¹²² An order becomes "final" for the purposes of

116. FED. R. CIV. P. 54(b).

117. Rule 54(b) states:

When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of the judgment. In the absence of such determination and direction, any order . . . however designated, which adjudicates fewer than all the claims . . . of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order . . . is subject to revision at any time before the entry of judgment adjudicating all the claims

....

Id.

118. *See id.* Multiple claims exist where each claim is factually independent or where each claim could be enforced separately. *See Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 582-83 (1980); *Rieser v. Baltimore & Ohio R.R.*, 224 F.2d 198, 199 (2d Cir. 1955).

119. *See Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956).

120. *See Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8 (1980) ("Not all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims. The function of the district court under the Rule is to act as a 'dispatcher.'") (citing *Sears, Roebuck & Co.*, 351 U.S. at 435).

121. *See FDIC v. Tripathi*, 769 F.2d 507 (8th Cir. 1985). The effect of certification is that the statute of limitations regarding appeal on the judgment begins to run. *See id.* at 508.

122. *See Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 512 (1950). In *Dickinson*, the Supreme Court stated that:

The obvious purpose of [Rule 54(b)] . . . is to reduce as far as possible the uncertainty and the hazard assumed by a litigant who either does or does not appeal from a judgment of the character we have here. It provides an opportunity for litigants to obtain from the District Court a clear statement of what that court is intending with reference to finality, and if such direction is denied, the litigant can at least protect himself accordingly.

Id. (footnote omitted); *see also* 10 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2654, at 37 (1998) ("The requirement in Rule 54(b) that the

§ 1291 when judgment is entered pursuant to Rule 54(b) and is immediately appealable even though it is not the final judgment regarding all of the claims or parties.¹²³

Nevertheless, Rule 54(b) certifications are not freely given.¹²⁴ As a result, this avenue of review, while appearing promising, is not often travelled. Another avenue of review that circumvents the finality requirement is the collateral order doctrine.

c. The Collateral Order Doctrine

The collateral order doctrine, which the United States Supreme Court first announced in *Cohen v. Beneficial Industrial Loan Corp.*,¹²⁵ provides for interlocutory appeals of collateral orders.¹²⁶ In *Cohen*, the United States Supreme Court held that where the order is within the "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause [of action] itself to require that appel-

court make an express determination that there is no just reason for delaying the review of a judgment on fewer than all of the claims or involving fewer than all of the parties in an action eliminated any doubt whether an immediate appeal may be sought.").

123. See FED. R. CIV. P. 54(b).

124. See *Spiegel v. Trustees of Tufts College*, 843 F.2d 38, 42 (1st Cir. 1988) ("Yet Rule 54(b) notwithstanding, there is a long-settled and prudential policy against the scattershot disposition of litigation."); *Morrison-Knudsen Co. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981) ("Judgments under Rule 54(b) must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties.").

125. 337 U.S. 541 (1949). In *Cohen*, the Supreme Court permitted the appeal of an order requiring the plaintiff in a stockholder's derivative suit to post security for the reasonable expenses of the defendant if the plaintiff was unsuccessful in the suit. See *id.* at 546-47.

126. See *id.* at 546. While there is some debate over whether the collateral order doctrine is an exception to § 1291 or merely an interpretation of § 1291, most courts, including the United States Supreme Court, believe that the collateral order doctrine is an exception. See *id.* at 545-46; see also *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985) (stating that the collateral order doctrine is a "narrow exception"); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 11 (1983) (characterizing the collateral order doctrine as an exception). But see *Iuteri v. Nardoza*, 662 F.2d 159, 161 (2d Cir. 1981) (characterizing an order as final because it gave relief which was collateral to the merits and was not subject to review after trial); *United States v. Lansdown*, 460 F.2d 164, 170 (4th Cir. 1972) (classifying the collateral order doctrine as an exception, but also stating that the Supreme Court, in *Cohen*, was merely interpreting the meaning of final judgment). See generally Redish, *supra* note 76, at 111 n.120 (acknowledging that the collateral order doctrine has been described as both an interpretation and an exception to § 1291 and finding that the better view is to regard it as an exception since its purpose is to permit review of interlocutory orders which are not final).

late consideration be deferred until the whole case is adjudicated," an interlocutory appeal may be had.¹²⁷ After the ruling in *Cohen*, courts and litigants frequently used the collateral order doctrine to avoid the final judgment rule.¹²⁸

Responding to the overuse of the collateral order doctrine, the Supreme Court, in *Coopers & Lybrand v. Livesay*,¹²⁹ restated the test. Under the new test, in order to be reviewed under the collateral order doctrine "an order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment."¹³⁰ The Supreme Court qualified the collateral order doctrine a second time when it stated that only when "rights . . . will be irretrievably lost in the absence of an immediate appeal" will an order qualify for immediate review under the collateral order doctrine.¹³¹ The reformulation effected in *Coopers & Lybrand* narrowed the scope of the collateral order doctrine.¹³² As a result, the federal courts have not allowed immediate appeals under the collateral order doctrine from pretrial deni-

127. *Cohen*, 337 U.S. at 546.

128. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 169-72 (1974); see also Martineau, *supra* note 54, at 740 (stating that "[t]here were few orders that a determined court of appeals could not qualify under the *Cohen* opinion"); Theodore D. Frank, *Requiem for the Final Judgment Rule*, 45 TEX. L. REV. 292 (1966) (discussing the widespread use of the collateral order rule to avoid final judgment requirements).

129. 437 U.S. 463 (1978). In *Coopers & Lybrand*, the Supreme Court rejected the Second Circuit's determination that a denial of a motion to certify a class was reviewable as a collateral order. See *id.* at 465.

130. *Id.* at 468.

131. See *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 430-31 (1985); see also *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985) (holding that an order involving qualified immunity is immediately appealable under the collateral order doctrine); *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982) (holding that an order involving absolute immunity is immediately appealable under the collateral order doctrine); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 579 (11th Cir. 1997) (holding that the court of appeals has jurisdiction over an order denying pro se status under the collateral order doctrine); *O'Reilly v. New York Times, Co.*, 692 F.2d 863, 866 (2d Cir. 1982) (holding that an order denying a motion to proceed pro se was appealable).

132. In each of the following cases, the order was held unreviewable under the collateral order doctrine. These cases evidence the narrow scope of the collateral order doctrine. See, e.g., *Lauro Lines v. Chasser*, 490 U.S. 495 (1989) (denying motion to dismiss because of a forum selection clause); *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799-800 (1989) (alleging violation of FED. R. CRIM. P. 6(e)); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988) (denying motion to stay or dismiss because of a similar matter pending in state court); *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988) (denying motion to dismiss on the ground that a defendant is immune from civil process, and because of forum non conveniens); *Richardson-Merrell Inc.*, 472 U.S. at 424 (disqualifying counsel in civil case); *Flanagan v. United States*, 465 U.S. 259 (1984) (disqualifying or refusing to disqualify counsel in a criminal case).

als of motions alleging speedy trial violations,¹³³ prosecutorial vindictiveness,¹³⁴ or motions to suppress evidence.¹³⁵

Nonetheless, the collateral order doctrine permits interlocutory review of orders that do not necessarily end the litigation on the merits. For example, the Supreme Court has held that denials of motions to dismiss an indictment based on the Double Jeopardy Clause, as well as denials of pretrial motions to dismiss based on the Speech and Debate Clause, are immediately appealable collateral orders.¹³⁶ In addition, the Supreme Court has held that rulings on

133. See *United States v. MacDonald*, 435 U.S. 850, 858-61 (1978) (denying immediate appellate review of a denial of a motion to dismiss based on an alleged violation of a constitutional right to a speedy trial because the issue was not collateral, the determination was not final, and the right to appeal was not forever lost if review was delayed); *United States v. Jackson*, 30 F.3d 572, 574 (5th Cir. 1994) (denying immediate appellate review of an alleged violation of the Speedy Trial Act because the order was reviewable at a later time); *United States v. Tsosie*, 966 F.2d 1357, 1359-62 (10th Cir. 1992) (same); *United States v. Buchanan*, 946 F.2d 325, 327 (4th Cir. 1991) (same); *United States v. Holub*, 944 F.2d 441, 442 (8th Cir. 1991) (same); cf. *United States v. Ford*, 961 F.2d 150, 151 (9th Cir. 1992) (per curiam) (holding that the district court dismissal of an indictment without prejudice for violation of the speedy trial provision of the Interstate Agreement on Detainers Act was not immediately appealable because the order was reviewable at a later date). But cf. *United States v. Gates*, 935 F.2d 187, 188 (11th Cir. 1991) (allowing an immediate appeal from a denial of a motion for release from pretrial detention pursuant to the Speedy Trial Act).

134. See *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 270 (1982) (per curiam) (denying the immediate appeal of a claim of prosecutorial vindictiveness because the issue was reviewable after judgment); *United States v. McKinley*, 38 F.3d 428, 431 (9th Cir. 1994) (refusing to consider issue of prosecutorial vindictiveness on interlocutory appeal for lack of jurisdiction). But cf. *United States v. P.H.E., Inc.*, 965 F.2d 848, 853-56 (10th Cir. 1992) (allowing the immediate appeal of a denial of a claim of bad-faith prosecution because the right not to be tried is lost once tried).

135. See *DiBella v. United States*, 369 U.S. 121, 131 (1962) (denying the immediate review of orders granting or denying the suppression of evidence which was allegedly procured through an unlawful search and seizure); *Carroll v. United States*, 354 U.S. 394, 404-05 (1957) (holding that an order granting a motion to suppress was not immediately appealable even if the result would be forced dismissal of the indictment for lack of evidence); *United States v. Carney*, 665 F.2d 1064, 1065 (D.C. Cir. 1981) (per curiam) (holding that a denial of a motion to suppress evidence that was purportedly covered by the Speech and Debate Clause was not immediately appealable because the decision was not final); cf. *United States v. Miller*, 14 F.3d 761, 765 (2d Cir. 1994) (denying the immediate appeal of an order, which denied a temporary restraining order that would have prohibited the release of intercepted conversations, because order was reviewable on final judgment and was adjudicated in appellant's own trials). But see *In re Search Warrant* (sealed), 810 F.2d 67, 70 (3d Cir. 1987) (allowing an immediate appeal of an order denying a motion to suppress medical records because the privacy rights of the patients were sufficiently independent from the criminal proceeding against the physician).

136. See *Witte v. United States*, 515 U.S. 389, 397 (1995) (allowing the immediate appeal of a denial of a motion to dismiss on double jeopardy grounds even where the accused had not yet been convicted a second time); *Helstoski v. Meanor*, 442 U.S. 500,

motions to reduce excessive bail are also immediately appealable collateral orders.¹³⁷

*d. The All Writs Act*¹³⁸

Writs of mandamus¹³⁹ also operate to provide review of non-final decisions despite the final judgment rule. The statutory basis for writs of mandamus is the All Writs Act, which provides that “[t]he Supreme Court and all courts established by [an] Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of the law.”¹⁴⁰

Higher courts use writs of mandamus to review cases of clear abuse of discretion by lower courts,¹⁴¹ and to review cases where a judge has attempted to exercise a power he or she does not pos-

508 (1979) (stating that Speech and Debate Clause protects members of Congress from standing trial, which would be lost if immediate review was unavailable); *Abney v. United States*, 431 U.S. 651, 659-63 (1977) (allowing an immediate appeal of a denial of a motion to dismiss on double jeopardy grounds because the right to not be tried twice is forever lost if tried).

137. See *Stack v. Boyle*, 342 U.S. 1, 6 (1951) (allowing immediate appeal of a denial of a motion to reduce bail because relief must be speedy to be effective); *United States v. Gigante*, 85 F.3d 83, 85 (2d Cir. 1996) (per curiam) (allowing immediate appeal of an order imposing a bail condition requiring the forfeiture of a \$1 million bail bond if the defendant committed a crime while on release, because the order was collateral to the issue of guilt in the instant case and involved a risk of unreviewable damage to a constitutional right); *United States v. Loya*, 23 F.3d 1529, 1530 (9th Cir. 1994) (allowing immediate appeal of an order denying bail pending a hearing on revocation of supervised release); *United States v. Smith*, 835 F.2d 1048, 1049-50 (3d Cir. 1987) (allowing immediate appeal of an order denying bail pending disposition of a habeas corpus petition because the order was separate from the merits, conclusively determined the question, and was effectively unreviewable on appeal from final judgment); *United States v. Spilotro*, 786 F.2d 808, 812-13 (8th Cir. 1986) (allowing immediate appeal of an order denying a motion to reduce bail after pretrial release because the order was final, collateral to the issue of guilt, and involved risk of irreparable damage to a constitutional right); cf. *United States v. Gundersen*, 978 F.2d 580, 582-83 (10th Cir. 1992) (allowing immediate appeal).

138. 28 U.S.C. § 1651 (1994).

139. Mandamus is a Latin word meaning “[w]e command.” BLACK’S LAW DICTIONARY 961 (6th ed. 1990). The writ of mandamus originated in English common law where it was generally used by the King to require an inferior court to do a particular thing. See Crick, *supra* note 55, at 544-55.

140. 28 U.S.C. § 1651 (1994).

141. See *Schlagenhauf v. Holder*, 379 U.S. 104, 109-10 (1964) (observing that a writ of mandamus may be issued appropriately to review an expropriation of judicial power or an abuse of discretion); *Rapp v. Van Dusen*, 350 F.2d 806, 812 (3d Cir. 1965) (stating that “modern use [of writ of mandamus] has been extended to include cases of clear abuse of discretion”); *In re Watkins*, 271 F.2d 771, 772 (5th Cir. 1959) (explaining that writs of mandamus should only be used in extreme cases where there is clear abuse of discretion or expropriation of judicial power).

sess.¹⁴² For example, the courts of appeals use the writ of mandamus as a method of supervising the district courts.¹⁴³ Many cases have held that the writ of mandamus should only be used "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."¹⁴⁴

Although the writ of mandamus can operate as an exception to the finality requirement of § 1291, the scope of its use is very narrow. In fact, writs of mandamus are to be used only in extraordinary circumstances, such as when there is an obvious error or a novel issue of law.¹⁴⁵ Despite the limited scope of its use, the writ

142. See *Securities and Exch. Comm'n v. Krentzman*, 397 F.2d 55, 59 (5th Cir. 1968).

143. See *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (affirming Seventh Circuit's decision to grant a writ of mandamus where the case had been referred to a master despite the objections of every party). The Court stated, "[w]e believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here." *Id.* at 259-60.

144. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943); see also *Allied Chem. Corp. v. Daiflon, Inc.* 449 U.S. 33, 35 (1980) (quoting *Roche*, 319 U.S. at 26); *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978) (same); *Kerr v. United States Dist. Court*, 426 U.S. 394, 402 (1976) (same); *Will v. United States*, 389 U.S. 90, 95 (1967) (same); *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245 (1964) (same); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382 (1953) (same); *United States Alkali Export Ass'n v. United States*, 325 U.S. 196, 202 (1945) (same); *Ex parte Republic of Peru*, 318 U.S. 578, 583 (1943) ("The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or of compelling it to exercise its authority when it is its duty to do so.").

145. See *Will*, 389 U.S. at 95 ("[O]nly exceptional circumstances . . . will justify the invocation of this extraordinary remedy."); *Schlagenhauf*, 379 U.S. at 110 (stating that the "writ is appropriately issued . . . when there is a 'usurpation of judicial power' or a clear abuse of discretion") (quoting *Bankers Life & Cas. Co.*, 346 U.S. at 383); *Ex parte Fahey*, 332 U.S. 258, 260 (1947) (stating that extraordinary writs are "reserved for really extraordinary causes"); *In re Attorney Gen. of United States*, 596 F.2d 58, 63 (2d Cir. 1979) (stating that only exceptional cases warrant the exercise of supervisory control through the use of a writ of mandamus); *National Farmers' Org., Inc. v. Oliver*, 530 F.2d 815, 816 (8th Cir. 1976) (holding that the power of courts of appeals to issue writs of mandamus should only be used in exceptional or extraordinary circumstances); *Dow Chem. Co. v. Taylor*, 519 F.2d 352, 355 (6th Cir. 1975) (same); *General Motors Corp. v. Lord*, 488 F.2d 1096, 1099 (8th Cir. 1973) (explaining that the use of a writ of mandamus is only appropriate in extraordinary circumstances, which may be present when a district court's order is made without jurisdiction, or where the order under attack is characteristic of an erroneous practice which is likely to recur, or where an order under attack exemplifies a novel and important question in need of guidelines that will aid the future resolution of similar cases); cf. *Paramount Film Distrib. Corp. v. Civic Ctr. Theatre, Inc.*, 333 F.2d 358, 360 (10th Cir. 1964) (stating that exercise of the power granted in 28 U.S.C. § 1651 is discretionary).

of mandamus nevertheless provides review of orders that could not be reviewed within the ambit of the finality requirement of § 1291.

Having traversed a great deal of background material, this Note will now turn its attention to the case that brought the issue discussed herein to light.

II. *UNITED STATES V. KIRBY*¹⁴⁶

A. *Factual Setting*

In 1983, after escaping from the Maze Prison in Belfast, Northern Ireland, Terence Kirby,¹⁴⁷ Pol Brennan,¹⁴⁸ and Kevin Artt¹⁴⁹ arrived in the United States.¹⁵⁰ After extradition was requested by the United Kingdom, United States' authorities arrested the potential extraditees and held them in custody to await an extradition hearing.¹⁵¹ The potential extraditees moved for bail, and the United States District Court for the Northern District of California set bail for each.¹⁵² All three were released, and the United States, on behalf of the United Kingdom, appealed to the United States Court of Appeals for the Ninth Circuit seeking review of the district court's grant of bail.¹⁵³ Before reviewing the grant of bail, the Ninth Circuit specifically addressed whether it had jurisdiction to review a bail decision by a district court judge in an extradition matter.¹⁵⁴

146. 106 F.3d 855 (9th Cir. 1997).

147. Terence Kirby was convicted of various violent offenses in Northern Ireland including felony murder, use of explosives, and possession of a firearm and explosives with intent to cause injury. *See In re Requested Extradition of Artt*, 972 F. Supp. 1253, 1263 (N.D. Cal. 1997).

148. Pol Brennan was convicted in Northern Ireland of possession or control of a bomb with the intent to endanger life or cause serious injury to property. *See id.* at 1261.

149. Kevin Artt was convicted of murder in Northern Ireland. *See id.* at 1265.

150. *See Kirby*, 106 F.3d at 857.

151. *See id.*

152. *See id.* at 858. On January 3, 1996, Pol Brennan was released and committed to the custody of his wife and employer on \$500,000 bond, secured by \$500,000 in property pledged by sureties. *See id.* Terence Kirby was released on the same date and committed to the custody of three people, other than his wife with whom he resided, on \$1,000,000 bond secured by \$500,000 in property and the signatures of five sureties. *See id.* On January 10, 1996, Kevin Artt was released and committed to the custody of his housemate and his employer on \$500,000 bond secured by \$100,000 in cash or property and the signatures of five sureties. *See id.*

153. *See id.* at 857-58.

154. *See id.* at 858.

B. *The Majority Opinion*

1. Preliminary Discussion of Jurisdictional Issue

Judge Sneed, writing for the United States Court of Appeals for the Ninth Circuit, began the majority's analysis by quoting § 1291 which grants courts of appeals "jurisdiction of appeals from all final decisions of the district courts."¹⁵⁵ Immediately thereafter and without further explanation, the majority disagreed with the extraditees's proposition that the court did not have jurisdiction to hear this appeal because, according to the extraditees, bail rulings in extradition matters were neither "final decisions" nor "decisions of district courts."¹⁵⁶ Next, the majority explained that granting bail in extradition matters is not favored and, in fact, bail is only granted if "special circumstances" exist.¹⁵⁷ The majority noted that the disapproval of bail in extradition cases unless "special circumstances" are present is in direct opposition to the presumption that bail will be granted in domestic cases without any required showing of special circumstances.¹⁵⁸ The majority then explained that, unlike habeas corpus cases where the government's right to appeal is set forth by statute,¹⁵⁹ there is no authority that explicitly grants jurisdiction to hear this appeal, and there is no Supreme Court ruling that speaks to this factual setting.¹⁶⁰

Before defining the bail decision in this case as a "final decision of the district court," the majority set forth several reasons why the argument made by the extraditees, that bail decisions in extradition cases are not reviewable, could not properly stand.¹⁶¹ First, the majority found that denying the government the right to appeal in this instance would result in asymmetry between the potential extraditee and the government because the potential extraditee could always appeal through the use of habeas corpus while the government would have no further avenue to pursue.¹⁶² Second, the ma-

155. *Id.*; see also 28 U.S.C. § 1291 (1994). See *supra* Part I.C.2 for a discussion of the history of § 1291.

156. See *Kirby*, 106 F.3d at 858.

157. See *id.* (citing *Wright v. Henkel*, 190 U.S. 40, 63 (1903)).

158. See *id.* (citing *Beaulieu v. Hartigan*, 554 F.2d 1, 2 (1st Cir. 1977)).

159. See *id.* Section 2255 of the Federal Courts Improvement Act provides the right to appeal habeas corpus decisions. See 28 U.S.C. § 2255 (1994 & Supp. II 1996). The statute states, "[a]n appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus." *Id.*

160. See *Kirby*, 106 F.3d at 858.

161. See *id.* at 858-59.

162. See *id.* at 858.

jority expressed concern that since the only time bail can be granted in extradition cases is when "special circumstances" are present, denying review of these determinations would "inadequately secure the 'special circumstances' requirement."¹⁶³ Third, the majority found that if the "special circumstances" requirement was allowed to be weakened through the denial of judicial review, then the ability of the United States to comply with its treaties would be viewed by other nations as compromised.¹⁶⁴

The majority asserted that the ability of the United States to comply with its treaties was especially important in light of the fervent attention being paid to the unrest in Northern Ireland,¹⁶⁵ such that the courts must act "sensitively and scrupulously" in the role appointed to them by the Supplementary Treaty.¹⁶⁶ Nevertheless, the majority recognized that the treaty did not guarantee jurisdiction to the court of appeals to review the grant of bail given by the district court in this case.¹⁶⁷ Rather, the majority found that § 1291 provided the basis for the court's jurisdiction over this matter.¹⁶⁸

2. Appellate Jurisdiction Under Section 1291

a. *Grants of bail are decisions of the district court*

The majority began by defining bail decisions as decisions of the district court and rejected the extraditees' argument and the dissent's argument that the district court granted bail using authority given by § 3184 of the Bail Reform Act of 1984.¹⁶⁹ The majority reasoned that since § 3184 merely pertains to apprehending and certifying the potential extraditee for extradition, and makes no mention of granting bail, the district court could not possibly have been using the power granted in § 3184 when it granted bail.¹⁷⁰

163. *Id.* at 859. The majority did not elaborate; however, when a standard is not reviewable it can be whittled away, because there is no means to ensure it remains stringent.

164. *See id.*

165. *See id.* *See generally* James T. Kelly, Article, *The Empire Strikes Back: The Taking of Joe Doherty*, 61 *FORDHAM L. REV.* 317, 318-29 (1992) (discussing thoroughly the problems occurring in Northern Ireland).

166. *See Kirby*, 106 F.3d at 859.

167. *See id.*; *see also* Extradition Treaty, *supra* note 10.

168. *See Kirby*, 106 F.3d at 859-61; *see also* 28 U.S.C. § 1291 (1994).

169. *See Kirby*, 106 F.3d at 859; *see also* Bail Reform Act, 18 U.S.C. § 3184 (1994 & Supp. II 1996). *See infra* note 170 for the relevant language of § 3184.

170. *See Kirby*, 106 F.3d at 859; *see also* 18 U.S.C. § 3184 (1994 & Supp. II 1996) which states:

Whenever there is a treaty or convention for extradition between the United States and any foreign government . . . any justice or judge of the

According to the majority, the authority of the district court to set bail was established in *Wright v. Henkel*,¹⁷¹ where the United States Supreme Court gave courts the power to grant bail.¹⁷² The *Kirby* majority reasoned that a judge's bail decision is a decision "of the district court" because the power was given to "courts" as opposed to judges or magistrates.¹⁷³ Thus, the majority concluded that the bail decision made in this case was a decision made by the district court as required by § 1291.¹⁷⁴

b. Bail rulings in extradition cases are final decisions under section 1291

In determining that bail decisions in extradition cases are final decisions, the majority reviewed § 3145 of the Bail Reform Act of 1984¹⁷⁵ which states, in relevant part, that appeals in criminal cases are "governed by the provisions of § 1291 of title 28 and § 3731 of [title 18]."¹⁷⁶ The majority then, without mention of § 3731,¹⁷⁷ analyzed § 1291 which covers "final decisions" and § 1292 which, con-

United States, or any magistrate . . . may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention . . . issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered.

. . . If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

Id.

171. 190 U.S. 40 (1903).

172. See *Kirby*, 106 F.3d at 859 (citing *Wright v. Henkel*, 190 U.S. 40, 63 (1903)).

173. See *id.*

174. See *id.*

175. 18 U.S.C. § 3145 (1994).

176. *Id.*; see also *Kirby*, 106 F.3d at 859.

177. Although it was not explicitly addressed in the opinion, § 3731 of the Omnibus Crime Control and Safe Streets Act governs when appeals may be taken by the United States in criminal cases. The dissent used the existence of § 3731 to argue that bail decisions in extradition cases are different than in criminal cases because, unlike extradition cases, there are explicit statutory provisions granting the right of appeal to the United States in criminal cases. See *Kirby*, 106 F.3d at 867; see also Bail Reform Act, 18 U.S.C. §§ 3145, 3731 (1994).

versely, covers "interlocutory decisions."¹⁷⁸ The majority deduced that bail decisions are not merely interlocutory because if they were, § 1292, which governs interlocutory decisions, would have been specified as governing domestic bail appeals in § 3145. Instead, the majority found that § 1291, which controls final decisions, was specified.¹⁷⁹ The majority then concluded that bail decisions in general are final decisions.¹⁸⁰

Next, the majority reasoned that the bail decision serves the same purpose in either a domestic criminal case or an extradition case.¹⁸¹ The majority pointed out that in both cases bail decisions determine whether a person will be held in custody or released pending further proceedings in his case.¹⁸² Due to this similarity, the majority found that bail decisions in extradition cases are final decisions just like bail decisions in criminal cases.¹⁸³

Further, the majority addressed the dissent's argument that the absence of a statutory provision allowing direct appeals in extradition cases distinguishes extradition cases from criminal cases precisely because there is such a statute concerning appeals in criminal cases.¹⁸⁴ The majority responded by noting that explicit statutory grants of authority are not always necessary before a court may act.¹⁸⁵ The majority found the dissent's argument to be inconsistent with the dissent's own reasoning in the case.¹⁸⁶ The majority pointed out that the dissent contradicted itself when it first agreed

178. *See Kirby*, 106 F.3d at 860.

179. *See id.*; *see also* 18 U.S.C. § 3731 (1994); 28 U.S.C. §§ 1291-92 (1994).

180. *See Kirby*, 106 F.3d at 860.

181. *See id.*

182. *See id.*

183. *See id.* After reaching this conclusion, the majority, in a footnote, countered the dissent's argument that extradition cases differ from criminal cases because the government can always begin new extradition proceedings and, in effect, appeal an adverse bail ruling. *See id.* at 860 n.5. The majority found the dissent's reasoning unsatisfactory, stating that if the government was required to initiate new proceedings instead of being allowed to directly appeal, then efficiency in the judicial process, which is of utmost concern, would be lost. *See id.*

184. *See id.* at 860.

185. *See id.* The majority explained in a footnote that previously, when no explicit statutory provision existed to provide for government appeals of bail rulings in criminal cases, some courts found jurisdiction. *See id.* at 860 n.6. (citing *Iuteri v. Nardoza*, 662 F.2d 159, 161 (2d Cir. 1981)). The majority further explained that Congress later passed the Bail Reform Act of 1984 to provide jurisdiction for government appeals of bail rulings in criminal cases explicitly where Congress said it may have been implicit in earlier statutes. *See id.* The majority appeared to suggest that jurisdiction for this appeal is also implicit in earlier statutes, i.e. § 1291, even though it has not yet been explicitly granted. *See id.* at 860.

186. *See id.*

that district court judges could grant bail in extradition cases despite no explicit authority to do so, and then argued that there could be no right to review the bail decision without explicit statutory authority.¹⁸⁷ The majority conceded that some basis must be found to provide jurisdiction before it could hear the case.¹⁸⁸ However, the majority also asserted that courts would be severely limited if explicit statutes were required in every instance.¹⁸⁹

After the preceding discussion, the majority reaffirmed its determination that, just as a decision to grant bail in a criminal case is final under § 1291, a decision to grant bail in an extradition case is also final.¹⁹⁰ Next, the majority turned to other case law for support of its holding.

c. Other case law supports the finding of jurisdiction

The majority supported its holding by citing other cases in which courts had reviewed bail decisions in extradition matters.¹⁹¹ The majority cited these cases because in each case the appellate court reviewed the district court's grant of bail, without ever addressing whether they had jurisdiction to do so.¹⁹² Next, the majority distinguished cases where courts had ruled that they did not have jurisdiction to review bail decisions in extradition cases.¹⁹³ The majority distinguished these cases by pointing out that in each

187. See *id.* In making this point, the majority stated, "Judge Noonan cannot have it both ways." *Id.* The majority further reasoned that either the district court judge had no authority to grant bail in the first place, or if he did have that power, then it follows that an explicit grant of authority is not always necessary before a judge may act. See *id.*

188. The majority found that § 1291 provided the basis for jurisdiction of this appeal. See *id.*

189. See *id.* at 860-61. The majority explained that courts do not need statutes telling them when to apply other statutes because courts have habitually applied statutes to specific situations without needing explicit authority to do so. See *id.* at 861. The majority found "statutory interpretation would be impossible if judges were precluded from applying statutes in this manner." *Id.*

190. See *id.*

191. See *id.* at 861-62; see also *United States v. Kin-Hong*, 83 F.3d 523 (1st Cir. 1996) (reversing district court's grant of bail); *In re Extradition of Smyth*, 976 F.2d 1535 (9th Cir. 1992) (same); *Hu Yau-Leung v. Soscia*, 649 F.2d 914, 920 (2d Cir. 1981) (affirming grant of bail by district court in habeas case following magistrate's issuance of certificate of extraditability); *United States v. Williams*, 611 F.2d 914 (1st Cir. 1979) (reversing district court's grant of bail).

192. See *Kirby*, 106 F.3d at 861.

193. See *id.* at 861-62; see also *In re Extradition of Ghandtchi*, 697 F.2d 1037 (11th Cir. 1983) (holding that the court did not have jurisdiction to review bail decision in extradition case); *In re Extradition of Krickemeyer*, 518 F. Supp. 388 (S.D. Fla. 1981) (same).

case the court had held that a district court may not review a magistrate's bail decision in an extradition case and did not rule on whether a district court's bail decision could be reviewed by the court of appeals.¹⁹⁴ Furthermore, the majority discounted these cases because they were not controlling authority over the Ninth Circuit and because they arose under a different treaty than the one at issue in *Kirby*.¹⁹⁵

d. Judicial responsibility under the treaty favors appellate review

As a final factor in its decision concerning the jurisdictional issue, the majority stressed that judicial responsibility for enforcing the treaties made by the United States was placed on the district courts and courts of appeals by Article 3(b) of the Supplementary Treaty because Article 3(b) explicitly named both sets of courts.¹⁹⁶ Considering that Article 3(b) provides for an "immediately available" appeal after a determination concerning the "political offense" defense,¹⁹⁷ the majority reasoned that the extraditees would most likely come before the court of appeals at a later date.¹⁹⁸

194. See *Kirby*, 106 F.3d at 861.

195. See *id.* The treaty involved in *In re Extradition of Ghandtchi*, 697 F.2d 1037 (11th Cir. 1983) and *In re Extradition of Krickemeyer*, 518 F. Supp. 388 (S.D. Fla. 1981), was the extradition treaty between the United States and the Federal Republic of Germany, Extradition Treaty, June 20, 1978, U.S.-F.R.G., 32 U.S.T. 1485.

196. See *Kirby*, 106 F.3d at 862. Article 3(b) of the Supplementary Treaty states: In the United States, the competent judicial authority shall only consider the defense to extradition set forth in paragraph (a) for offenses listed in Article I of this Supplementary Treaty. A finding under paragraph (a) shall be immediately appealable by either party to the *United States district court, or court of appeals*, as appropriate. The appeal shall receive expedited consideration at every stage. The time for filing a notice of appeal shall be 30 days from the date of the filing of the decision. In all other respects, the applicable provisions of the Federal Rules of Appellate Procedure or Civil Procedure, as appropriate, shall govern the appeals process.

Extradition Treaty, *supra* note 10 (emphasis added).

197. The "political offense" defense is embodied in Article 3(a) of the Supplementary Treaty which states:

Notwithstanding any other provision of this Supplementary Treaty, extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained, or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

Extradition Treaty, *supra* note 10. See *supra* note 34 for further discussion of the "political offense" defense to extradition.

198. See *Kirby*, 106 F.3d at 862.

While stressing the role of the United States' courts in protecting the interests and rights of all of the parties involved, the majority concluded that these rights and interests would be best preserved by review of both the grant of bail and its sufficiency immediately after the bail decision was made, as opposed to after the completion of the extradition hearing.¹⁹⁹ Based on the reasoning set forth above, the majority found that it was the court's duty to review the grants of bail and their sufficiency.²⁰⁰ The majority then reviewed the grants of bail and found that the grants of bail, as well as the terms of each extraditee's bail release, were both proper and sufficient.²⁰¹

C. *The Dissenting Opinion*

Judge Noonan began the dissent by noting that federal courts are courts of limited jurisdiction, and as such, they must find their

199. *See id.* at 862-63.

200. *See id.* at 863.

201. *See id.* at 863-65. The majority considered four factors when reviewing the grant of bail. The factors considered were the factors relied on by the district court to show that special circumstances existed when granting bail. *See id.* at 863-64. The majority found that the first factor, delay, was recognized by this and other circuits, and because the appellees themselves were not responsible for the delay, it could not find that the district court erred in relying on delay as a special circumstance. *See id.* at 863 (citing *United States v. Kin-Hong*, 83 F.3d 523, 524 (1st Cir. 1996); *Salerno v. United States*, 878 F.2d 317 (9th Cir. 1989)).

Next, the majority looked at the "parity with Smyth" factor. *See id.* at 863. Smyth, a potential extraditee whose extremely similar case was determined before this case, had been out on bail for over one year by the time the appellees' bail hearings were held. *See id.* The district court, in releasing the appellees, stressed that they should be treated consistent with Smyth. *See id.* Conversely, the United States, focusing on the ultimate revocation of Smyth's bail upon review, argued on appeal that the appellees should be kept in custody. *See id.* The majority found that while both arguments had merit, the district court's reliance on "parity with Smyth" as a special circumstance was understandable. *See id.*

Next, the court rejected the district court's third special circumstance, that the appellees would not receive credit for time spent in custody in the United States upon returning to the United Kingdom, because it is common in extradition cases for persons extradited to not receive credit for time spent in custody in the United States upon return to the requesting nation. *See id.*

Reviewing the fourth factor, the majority stated that the district court could not be faulted for finding that the "cloud" cast on extradition proceedings by the *Lobue* case was a special circumstance. *See id.* at 864. In *Lobue v. Christopher*, 893 F. Supp. 65 (D.D.C. 1995), *vacated*, 82 F.3d 1081 (D.C. Cir. 1996), the court held that 18 U.S.C. § 3184 (1994 & Supp. II 1996) violated the separation of powers requirement because it empowered an Executive Branch official, the Secretary of State, to review an Article III judicial officer. *See Lobue*, 893 F. Supp. at 78. Hence, at the time the district court judge in *Kirby* heard the bail hearings, there was a "cloud" cast over all extradition proceedings by the *Lobue* decision. *See Kirby*, 106 F.3d at 864.

authority to review a case in either a statute or the Constitution.²⁰² The dissent next stressed that the jurisdiction of the courts of appeals is determined by statute,²⁰³ and that courts may not expand their given jurisdiction by judicial decision.²⁰⁴ The dissent noted that the United States had not cited any statute that would confer jurisdiction on the United States Courts of Appeals to review bail decisions in extradition matters.²⁰⁵

Even though the dissent found that the absence of any explicit statutory authority should be the end of the court's discussion, the dissent continued to address arguments raised by the United States and by the majority.²⁰⁶ In response to the majority's citation of case law in which courts reviewed bail decisions, the dissent highlighted the absence of any discussion within these decisions concerning jurisdiction to review grants of bail in extradition cases.²⁰⁷ The dissent found this to be critical because when a court does not discuss an issue, the case has no precedential value on that issue.²⁰⁸ The dissent questioned the majority's reliance on such "nonprecedents."²⁰⁹

Next, the dissent addressed the argument made by the United States that since the district court had no authority to grant bail in this case, the district court must have been granting a writ of habeas corpus.²¹⁰ Stating that habeas corpus and bail are two entirely different things, the dissent rejected this argument.²¹¹ The dissent

202. See *Kirby*, 106 F.3d at 865 (Noonan, J., dissenting) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). For a discussion of the jurisdictional requirement in general, see *supra* Part I.C.1.

203. See *Kirby*, 106 F.3d at 865 (Noonan, J., dissenting) (citing *In re Vylene Enter., Inc.*, 968 F.2d 887, 889 (9th Cir. 1992)). Section 1291 determines the jurisdiction of the courts of appeals. See Act of June 25, 1948, 28 U.S.C. § 1291 (1994).

204. See *Kirby*, 106 F.3d at 865 (Noonan, J., dissenting) (citing *Kokkonen*, 511 U.S. at 377).

205. See *id.* (Noonan, J., dissenting).

206. See *id.* at 865-67 (Noonan, J., dissenting).

207. See *id.* at 865 (Noonan, J., dissenting) (citing *In re Extradition of Smyth*, 976 F.2d 1535 (9th Cir. 1992)).

208. See *id.* at 865-66 (Noonan, J., dissenting) (citing *United States v. Vroman*, 975 F.2d 669, 672 (9th Cir. 1992)).

209. See *id.* at 866 (Noonan, J., dissenting).

210. See *id.* (Noonan, J., dissenting). If this argument had been accepted, the government would have been entitled to an appeal pursuant to § 2255 of the Federal Courts Improvement Act. See 28 U.S.C. § 2255 (1994 & Supp. II 1996). Section 2255 states, in relevant part, "An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus." *Id.*

211. See *Kirby*, 106 F.3d at 866 (Noonan, J., dissenting). Emphasizing the differences between a grant of bail and a grant of a writ of habeas corpus, the dissent noted

briefly recognized that a writ of mandamus would not be appropriate.²¹² The dissent noted that both parties had briefed the issue, and the United States had conceded that three of the five factors necessary to obtain mandamus were absent.²¹³

Finally, the dissent turned to the majority's argument that bail decisions by district court judges in extradition matters are reviewable because they are in fact "final decisions." First, the dissent found that the decision to grant bail was not made by the district court.²¹⁴ The dissent reasoned that an extradition judge does not exercise judicial power; rather, he or she is an auxiliary to the executive branch.²¹⁵ According to the dissent, an extradition judge's decision can not be a final decision of the district court because he or

that bail is normally governed by statute whereas habeas corpus is a constitutional remedy. *See id.* (Noonan, J., dissenting) (citing Bail Reform Act of 1984, 18 U.S.C. §§ 3146, 3148, 3156 (1994)). The dissent further reasoned that habeas corpus challenges the legality of the confinement by the state whereas bail does not; instead, when one asks for bail, he is merely stating that confinement is not necessary to guarantee his presence at further proceedings in his case. *See id.* (Noonan, J., dissenting) (citing *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995)). Further, the dissent remarked that in order for review on habeas corpus to be granted, all other avenues of review must be exhausted. *See id.* (Noonan, J., dissenting) (citing *Rose v. Lundy*, 455 U.S. 509, 515-16 (1982)). The dissent pointed out that this is in contrast to an application for bail, which can be determined immediately, by petitioning the judge in charge of the prisoner. *See id.* (Noonan, J., dissenting). Lastly, the dissent observed that the standard of review is *de novo* in a habeas case whereas the standard of review is deferential when reviewing a bail decision. *See id.* (Noonan, J., dissenting) (citing *Sanders v. Ratelle*, 21 F.3d 1446, 1451 (9th Cir. 1994); *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990)). *De novo* review results in "[t]rying the matter anew; the same as if it had not been heard before and as if no decision had been previously rendered." BLACK'S LAW DICTIONARY 435 (6th ed. 1990). Conversely, deferential review results in the court upholding the lower court's decision unless it is obviously in error. In this sense, the appellate court "defers" to the judgment of the lower court. Ultimately, the dissent concluded that the extraditees applied for and were granted bail; hence, they could not have been granted writs of habeas corpus. *See Kirby*, 106 F.3d at 866 (Noonan, J., dissenting).

212. *See Kirby*, 106 F.3d at 866 (Noonan, J., dissenting).

213. *See id.* (Noonan, J., dissenting). The five factors which must be present to obtain mandamus, as stated in *Bauman v. United States District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977), are:

(1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires . . . (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal (3) The district court's order is clearly erroneous as a matter of law (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules (5) The district court's order raises new and important problems, or issues of law of first impression.

(citations omitted).

214. *See Kirby*, 106 F.3d at 866 (Noonan, J., dissenting).

215. *See id.* (Noonan, J., dissenting) (citing *In re Kaine*, 55 U.S. (14 How.) 103, 119 (1852); *In re Extradition of Howard*, 996 F.2d 1320, 1325 (1st Cir. 1993)).

she is acting as an auxiliary, not as the court.²¹⁶

Second, the dissent found that the district court's order was not final because the government is not barred by *res judicata*²¹⁷ in extradition matters.²¹⁸ The dissent explained that if the extradition decision itself is not final, then the bail decision within it cannot be final.²¹⁹ The dissent noted that releases on bail do not conclusively determine a disputed question.²²⁰ Accordingly, the dissent asserted that noncompliance with a technical rule of procedure was sufficient to deny this court jurisdiction.²²¹ Consequently, the dissent disputed the majority's reasoning and found that the decision could not be a "final decision" as called for by § 1291.²²²

Third, the dissent explained that since the Federal Rules of Procedure pertain to either criminal or civil cases, the Federal Rules contain no provisions regarding the review of bail decisions in extradition matters.²²³ The dissent stressed that an explicit statute was necessary to provide appellate review of bail orders beyond any alleged jurisdictional power provided for in § 1291.²²⁴ Based on this observation, the dissent reasoned that the absence of an explicit statute in this situation highlighted the lack of jurisdiction.²²⁵

The dissent concluded its reasoning by questioning the majority's use of § 1291 as a basis for jurisdiction in this case.²²⁶ The dissent challenged the majority's reliance on § 1291 because that reliance created the impression that § 3731, which was created to provide jurisdiction over appeals in domestic criminal bail cases, is

216. See *Kirby*, 106 F.3d at 866 (Noonan, J., dissenting); see also Act of June 25, 1948, 28 U.S.C. § 1291 (1994).

217. *Res judicata* refers to the "[r]ule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action." BLACK'S LAW DICTIONARY 1305 (6th ed. 1990).

218. See *Kirby*, 106 F.3d at 866 (Noonan, J., dissenting) (citing *Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir. 1978)).

219. See *id.* (Noonan, J., dissenting).

220. See *id.* at 866-67 (Noonan, J., dissenting) (citing *Confederated Salish v. Simonich*, 29 F.3d 1398, 1402 (9th Cir. 1994)).

221. See *id.* at 867 (Noonan, J., dissenting) (citing *Lopez v. City of Needles*, 95 F.3d 20 (9th Cir. 1996); *Proud v. United States*, 704 F.2d 1099, 1100 (9th Cir. 1983)).

222. See *id.* at 866-67 (Noonan, J., dissenting); see also 28 U.S.C. § 1291 (1994).

223. See *Kirby*, 106 F.3d at 867 (Noonan, J., dissenting) (citing *Merino v. United States Marshall*, 326 F.2d 5, 12-13 (9th Cir. 1963)).

224. See *id.* (Noonan, J., dissenting) (citing 18 U.S.C. §§ 3145, 3731 (1994)).

225. See *id.* (Noonan, J., dissenting).

226. See *id.* (Noonan, J., dissenting).

redundant.²²⁷ The dissent suggested that if bail decisions fit as neatly within § 1291 as the majority found, then the enactment of § 3731 would have been unnecessary because the right to appeal domestic grants of bail would have already been provided for by § 1291.²²⁸ The dissent commented that it was a poor choice for the majority to interpret an existing statute such that it renders a later act of Congress unnecessary.²²⁹

Lastly, the dissent discussed policy choices that should shape the court's actions.²³⁰ The dissent recognized that reaching a decision that would give the court jurisdiction was enticing.²³¹ However, the dissent emphasized that the court should not act beyond that which has been mandated by Congress.²³² The dissent remarked that the court's decision should be enough to alert Congress to the potential void in the statutes that provide jurisdiction to the courts of appeals, and that it is Congress's duty, not the courts', to fill that void if Congress deems it necessary.²³³ The dissent asserted that judicial activism that goes so far that a judge will create jurisdiction where none exists, simply because it is desirable, is in direct opposition to our government of laws, which requires that courts only act where a law has given them the authority to do so.²³⁴

Now that familiarity with the salient information has been gained, the next section of this Note analyzes the Ninth Circuit's decision in *United States v. Kirby*.

III. LEGAL ANALYSIS

International extradition entails a process that is controlled by treaty and federal statutes.²³⁵ These sources of law provide a mechanism whereby a country who is a party to the treaty can request the surrender of a person who is found within the territory of the United States.

During the extradition process, the "extraditee" awaits a hearing that determines whether he or she will be extradited. Some-

227. See *id.* (Noonan, J., dissenting).

228. See *id.* (Noonan, J., dissenting).

229. See *id.* (Noonan, J., dissenting).

230. See *id.* (Noonan, J., dissenting).

231. See *id.* (Noonan, J., dissenting).

232. See *id.* (Noonan, J., dissenting).

233. See *id.* (Noonan, J., dissenting).

234. See *id.* (Noonan, J., dissenting).

235. See *supra* Part I.A for a discussion of the extradition process in greater depth.

times, while awaiting this hearing, the extraditee moves for bail. If the presiding judicial body grants bail, the United States can attempt to have the grant of bail revoked, thereby placing the potential extraditee back in its custody, by reinstituting the extradition process with a second judicial body or by obtaining appellate review of the bail decision.²³⁶

The Ninth Circuit, in *United States v. Kirby*,²³⁷ was the first court to address the jurisdictional issue of whether the United States Courts of Appeals may review a grant of bail by a United States District Court judge in an extradition matter.²³⁸ The primary disagreement between the majority and dissenting opinions in *Kirby* centered around whether a grant of bail in an international extradition matter is a final decision of the district court, which may be reviewed by the court of appeals.²³⁹

The *Kirby* majority found that appellate jurisdiction existed for the court of appeals to review the district court's grant of bail because 28 U.S.C. § 1291 provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district court."²⁴⁰ The majority supported its holding with several reasons. First, the majority found that bail could only be granted in extradition cases by "courts."²⁴¹ Consequently, the majority reasoned that the bail decision in *Kirby* was a decision of a district court.²⁴² Second, the majority concluded that the grant of bail given in this case was a final decision because it is similar to a bail decision in a domestic criminal case which, according to the majority's analysis, is a final decision.²⁴³ The majority held that, because the decision was a final decision of the district court, the decision was reviewable within the jurisdiction provided to the courts of ap-

236. See *supra* Part I.A.2 for a discussion of the granting of bail within the extradition process.

237. 106 F.3d 855 (9th Cir. 1997).

238. Other courts have reviewed bail decisions in extradition cases; however, *Kirby* was the first to explain that § 1291 provides the basis of jurisdiction to hear the appeal. See, e.g., *United States v. Kin-Hong*, 83 F.3d 523 (1st Cir. 1996) (reversing district court's grant of bail); *In re Extradition of Smyth*, 976 F.2d 1535 (9th Cir. 1992) (same); *United States v. Williams*, 611 F.2d 914 (1st Cir. 1979) (same); cf. *Hu Yau-Leung v. Soscia*, 649 F.2d 914, 920 (2d Cir. 1981) (affirming grant of bail by district court in habeas case following magistrate's issuance of certificate of extraditability).

239. See *supra* Parts II.B and II.C, respectively, for a detailed discussion of the majority and dissenting opinions in *Kirby*.

240. *Kirby*, 106 F.3d at 859 (quoting 28 U.S.C. § 1291 (1994)).

241. See *id.* (quoting *Wright v. Henkel*, 190 U.S. 40, 63 (1903)).

242. See *id.*

243. See *id.* at 860.

peals by § 1291.²⁴⁴

Conversely, the dissent concluded that appellate jurisdiction is not available to the courts of appeals for review of a grant of bail given by a district court judge.²⁴⁵ The dissent also supported its finding with several reasons. The dissent found that where there is no explicit statutory grant of power, courts are powerless to act.²⁴⁶ Next, the dissent, stating that the power to hear extradition cases is not a judicial power, found that grants of bail in international extradition matters are not decisions of the court.²⁴⁷ The dissent also disagreed with the majority's classification of the bail decision as a final decision.²⁴⁸ The dissent concluded its reasoning by asserting that the right to confer this jurisdiction lies with Congress and not the courts.²⁴⁹ Recognizing that the opinions rendered in *Kirby* make justifiable points, this Note, nevertheless, argues that a sounder decision could have been reached in *Kirby*. This analysis begins by highlighting the questionable bases of the majority's reasoning.

A. *Bail Decisions in International Extradition Cases Are Not Final Decisions*

In determining that bail decisions in extradition matters are final, the majority relied on § 3145 of the Bail Reform Act of 1984.²⁵⁰ As described earlier, § 3145 controls appeals from grants of bail in domestic criminal cases by magistrates or other persons who are not judges of the court of original jurisdiction over the matter.²⁵¹ The majority stressed the language of § 3731, which states that such appeals are "governed by section 1291 and by section 3731" of Title 28.²⁵² The majority focused on the words of § 3145, stating that appeals from bail decisions in criminal cases are governed by § 1291, which governs appellate review of final decisions.²⁵³ The majority

244. *See id.*

245. *See id.* at 865 (Noonan, J., dissenting).

246. *See id.* (Noonan, J., dissenting).

247. *See id.* at 866 (Noonan, J., dissenting).

248. *See id.* (Noonan, J., dissenting).

249. *See id.* at 867 (Noonan, J., dissenting).

250. *See id.* at 860; *see also* 18 U.S.C. § 3145 (1994). For a discussion of the relevant portion of the *Kirby* decision, *see supra* Part II.B.2.b.

251. 18 U.S.C. § 3145 (1994). For the sake of clarity, assume that any future reference to grants of bail or bail decisions made by magistrates includes within it a reference to grants of bail or bail decisions made by any other persons who are not judges of the court of original jurisdiction over the matter.

252. *See Kirby*, 106 F.3d at 860 (quoting 18 U.S.C. § 3145 (1994)).

253. *See id.*

then concluded “[t]hus by reason of 18 U.S.C. § 3145, bail decisions in criminal cases are ‘final’ within the meaning of section 1291.”²⁵⁴ In reaching this conclusion, the majority implied that § 1292, which governs interlocutory appeals, would have been specified in § 3145 as governing appeals from grants of bail in domestic cases if bail decisions, in general, were merely interlocutory.²⁵⁵

Comparing bail decisions in extradition cases with bail decisions in domestic criminal cases and finding little difference, the majority concluded that bail decisions, irrespective of the context in which they are made, are final decisions.²⁵⁶ Confidently, the majority stated, “To rebut this presumption, there must be a principled basis for holding that bail decisions in extradition cases are somehow ‘less final’ than bail decisions in criminal cases.”²⁵⁷ Yet, the majority’s argument rests on the assumption that grants of bail in criminal cases, which are similar to extradition cases, are final decisions. This assumption is questionable.

In order to find that criminal bail decisions were final, the majority mistakenly relied on § 3145 as the parallel jurisdictional provision supporting appeals from grants of bail in domestic criminal cases. However, § 3145 actually governs bail decisions made by magistrates.²⁵⁸ Section 3731, on the other hand, governs appeals of grants of bail by district court judges and provides the true analytical parallel.²⁵⁹ A district court judge made the bail decision in *Kirby*, not a magistrate.²⁶⁰ The *Kirby* majority’s mistaken reliance on § 3145 is significant because § 3731, unlike § 3145, does not contain any language recognizing § 1291²⁶¹ as a governing rule. Thus, if the *Kirby* majority had relied on the true statutory parallel in this case to make its argument, it would have been left without a basis for its argument. The language of § 3145, which states that § 1291, in conjunction with § 3731, controls grants of bail, relates to appeals from decisions by magistrates, not decisions by district court judges.²⁶²

Assuming that the above distinction is not dispositive, an addi-

254. *Id.*

255. *See id.*

256. *See id.*

257. *Id.*

258. 18 U.S.C. § 3145 (1994); *see also supra* note 50 for the text of § 3145.

259. 18 U.S.C. § 3731 (1994); *see also supra* note 48 for the text of § 3731.

260. *See Kirby*, 106 F.3d at 857.

261. 28 U.S.C. § 1291 (1994).

262. *See* 18 U.S.C. § 3145 (1994); *see also* 18 U.S.C. § 3731 (1994), which addresses appeals of decisions by district court judges.

tional flaw in the majority's reasoning occurs at this point of the *Kirby* opinion. The majority ignored the language of § 3145 which states that § 3731 also governs bail decisions.²⁶³ Section 3731 provides that appeal by the United States of an adverse bail decision by a district court lies with a court of appeals.²⁶⁴ As noted by the dissent, if bail decisions in criminal cases were final, then this portion of § 3731 would have been unnecessary because the United States would have already been able to appeal the decision as a final decision.²⁶⁵ Further, the legislative history of § 3145 contradicts the majority's position that the reference to § 1291 in § 3145 equates bail decisions with finality.²⁶⁶

After the enactment of the Bail Reform Act of 1984, § 3731 explicitly grants the government the right to appeal an adverse bail decision.²⁶⁷ It follows that § 1291 alone was not sufficient to grant jurisdiction to the courts of appeals over appeals by the government from adverse domestic bail rulings. The legislative history of § 3145 discloses the reasoning behind the legislature's choice to specify both § 1291 and § 3145 as governing bail decisions in criminal cases.

In analyzing § 3145, the Senate noted that "[a]ppeals under this section are to be governed by 28 U.S.C. § 1291 *in the case of an appeal by the defendant* and by 18 U.S.C. § 3731 *in the case of an appeal by the government*."²⁶⁸ Hence, the legislative history of § 3145 contradicts the majority's position that bail decisions are always final decisions. While bail decisions may be considered final under the majority's reasoning when adverse to the defendant, bail decisions adverse to the government are not.²⁶⁹ In fact, the legislative history explicitly shows that the legislature did not intend its reference to § 1291 to signify that grants of bail are final.²⁷⁰

Section 1291 by itself does not confer jurisdiction to review bail decisions in domestic criminal cases when the government is the appellant. Similarly, § 1291 can not by itself provide jurisdiction for review of bail decisions in international extradition cases when the government is the appellant. In addition to the questionable as-

263. See *Kirby*, 106 F.3d at 860.

264. 18 U.S.C. § 3731 (1994).

265. See *Kirby*, 106 F.3d at 867 (Noonan, J., dissenting).

266. See SENATE COMMITTEE ON THE JUDICIARY, S. REP. NO. 98-225, at 29-30 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3212-13.

267. 18 U.S.C. § 3731 (1994).

268. SENATE COMMITTEE ON THE JUDICIARY, S. REP. NO. 98-225, at 29 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3212 (emphasis added).

269. See *id.*

270. See *id.*

sumptions described above, the majority's argument that courts may act without explicit authority is also dubious.

B. *The Majority's Argument that Courts May Act Without Explicit Authority is Not Supported*

Countering the dissent's suggestion that without explicit statutory authority there can be no review, the majority pointed to the Second Circuit's exercise of jurisdiction in *Iuteri v. Nardoza*.²⁷¹ In *Iuteri*, the Second Circuit reviewed a grant of bail given by a district court judge pending a decision on Iuteri's petition for a writ of habeas corpus.²⁷² Since *Iuteri* was decided prior to the enactment of the Bail Reform Act of 1984, there was, at that time, no explicit statutory authority which authorized review of a grant of bail in a domestic criminal case.²⁷³ Once enacted, §§ 3145 and 3731 of the Bail Reform Act of 1984, respectively, explicitly provided that grants of bail by magistrates and district court judges can be immediately appealed.²⁷⁴

The majority stated that by enacting §§ 3145 and 3731, Congress was making explicit the appellate jurisdiction which was implicit before.²⁷⁵ However, a close examination of § 3145's legislative history reveals that the legislature did not necessarily accept that it was providing jurisdiction where it had been implicit previously.²⁷⁶ In regard to the amendments made to § 3145, the Senate stated that:

Section 3145, in conjunction with the amendment to 18 U.S.C. 3731, would specifically authorize the government, as well as the defendant, to seek review and appeal of release decisions. The Bail Reform Act [of 1996] makes no provisions for review of decisions upon motion of the government, although this authority may be implicit in the Act.²⁷⁷

After appearing to recognize that this authority may have been implicit, the Senate added a footnote citing to *United States v. Zuccaro*,²⁷⁸ a case holding that the right of the government to seek re-

271. 662 F.2d 159 (2d Cir. 1981); see also *Kirby*, 106 F.3d at 860 & n.6.

272. See *Iuteri*, 662 F.2d at 161.

273. See *Kirby*, 106 F.3d at 860 n.6.

274. 18 U.S.C. §§ 3145, 3731 (1994).

275. See *Kirby*, 106 F.3d at 860 n.6.

276. See SENATE COMMITTEE ON THE JUDICIARY, S. REP. NO. 98-225, at 29-30 (1983), reprinted in 1984 U.S.C.C.A.N. at 3212-13.

277. *Id.* at 30, reprinted in 1984 U.S.C.C.A.N. 3213.

278. 645 F.2d 104 (2d Cir. 1981).

consideration of a bail determination by the trial court is implicit in the Bail Reform Act [of 1966].²⁷⁹ Next, the Senate stated, “[s]ince 18 U.S.C. 3147(b) [of the Bail Reform Act of 1966] permits appeal of release decisions only when the defendant has been detained, *it is doubtful that the government has any right to appeal*, as opposed to a right to seek reconsideration under the Act.”²⁸⁰ As the legislature noted, before the enactment of the Bail Reform Act of 1984, appeal of release decisions was not permitted when the defendant had been granted bail.²⁸¹ The legislature thus concluded that the right of the government to appeal was “doubtful,” despite the fact that the *Zuccaro* court may have found it was implicit.²⁸²

The majority, at this juncture, was attempting to establish that if jurisdiction was implicit to review grants of bail in domestic criminal cases before enactment of explicit statutory authority, then jurisdiction is implicit in this case to review grants of bail in international extradition cases without explicit statutory authority.²⁸³ However, simply because Congress eventually sanctioned the exercise of jurisdiction by courts like *Zuccaro*, which in fact lacked explicit jurisdiction, the eventual sanction does not signify that Congress has delegated its power to determine jurisdiction to the courts.

Having addressed several difficulties with the *Kirby* majority’s analysis, this Note will now turn its attention to providing a simpler solution to this issue. The *Kirby* court did not need to force grants of bail given by district court judges into the category of “final decisions” in order to obtain jurisdiction over the matter. Rather, the *Kirby* court could have relied on the collateral order doctrine to tailor a solution to the problem.

C. *The Kirby Court Did Not Address the Collateral Order Doctrine*

An alternative avenue for conferring jurisdiction on the United States Courts of Appeals to review bail decisions by district court judges in international extradition cases, which was not addressed by either the majority or the dissent in *Kirby*, is the collateral order

279. See SENATE COMMITTEE ON THE JUDICIARY, S. REP. NO. 98-225, at 30 n.93 (1983), reprinted in 1984 U.S.C.C.A.N. 3213 n.93.

280. *Id.* (emphasis added).

281. See 18 U.S.C. § 3147(b) (repealed 1984).

282. See SENATE COMMITTEE ON THE JUDICIARY, S. REP. NO. 98-225, at 30 n.93 (1983), reprinted in 1984 U.S.C.C.A.N. 3213 n.93.

283. See *United States v. Kirby*, 106 F.3d 855, 860 (9th Cir. 1997).

doctrine. The collateral order doctrine operates to allow review of decisions that are collateral to the merits and which conclusively determine an important issue.

In order to fall within the collateral order doctrine, the decision "must: [1] conclusively determine the disputed question [2] resolve an important issue completely separate from the merits of the case, and [3] be effectively unreviewable on appeal from a final judgment."²⁸⁴ Grants of bail in international extradition matters fall squarely within these requirements.

Grants of bail in international extradition matters meet the first requirement of the collateral order doctrine because they conclusively determine the question of whether potential extraditees will be released on bail.²⁸⁵ After the bail decision is made, either bail is granted or bail is refused. When bail is denied, the potential extraditee may receive review of sorts by petitioning for a writ of habeas corpus.²⁸⁶ However, when bail is granted by the district court, the decision will not be reviewed prior to trial.²⁸⁷ In addition, bail decisions in extradition cases meet the second requirement of the collateral order doctrine because they are separate from the merits of an extradition case.²⁸⁸ The merits of an extradition case involve a determination of whether a person sought by a

284. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). See *supra* Part I.B.3.a for a discussion of the origin and application of the collateral order doctrine.

285. See *Abney v. United States*, 431 U.S. 651 (1977). In *Abney*, the Supreme Court found that an order denying a motion to dismiss on double jeopardy grounds was immediately appealable because it constituted a "complete, formal, and, in the trial court, final rejection of an accused's [claim]." *Id.* at 651, 659. Similarly, the grant of bail in this case, if not reviewable, constitutes a final answer to the bail question.

286. See *Escobedo v. United States*, 623 F.2d 1098, 1101 (1980) (stating that habeas corpus review of an extradition decision is limited to "'whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty'" (quoting *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925))); see also *Shapiro v. Ferrandina*, 478 F.2d 894, 901 (2d Cir. 1973) (recognizing that the magistrate's decision is not appealable, but that the extraditee may obtain review by way of a writ of habeas corpus). See generally BASSIOUNI, *supra* note 23, at 737-49; Hall, *supra* note 23, at 605.

287. See *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) (citation omitted).

288. See 18 U.S.C. § 3184 (1994 & Supp. II 1996) (stating that during an extradition hearing the judicial body will determine whether the evidence is sufficient to sustain the charge under the provisions of the applicable treaty); see also *Collins v. Loisel*, 259 U.S. 309, 314-16 (1922) (stating that an extradition hearing merely decides whether there is competent evidence which, according to the law of the surrendering nation, would justify the accused's apprehension and commitment for trial if the crime had been committed in the surrendering nation). See *supra* Part I.A.1 for a detailed description of the extradition hearing and the issues resolved therein.

foreign country will be extradited.²⁸⁹ The determination as to bail has no relation to the determination as to extradition; therefore, it is separate from the merits of the case.

In *Stack v. Boyle*,²⁹⁰ the Supreme Court, citing *Cohen v. Beneficial Loan Corp.*,²⁹¹ held that an order denying a motion to reduce excessive bail was immediately appealable. Although the Supreme Court was discussing a bail decision in a domestic criminal case, the Court noted that an order fixing bail is "entirely independent of the issues to be tried."²⁹² The Supreme Court later noted, in *Carroll v. United States*,²⁹³ that even in criminal cases, where the use of the collateral order doctrine is rare, "[t]he only decision of [the Supreme Court] applying to a criminal case the reasoning of *Cohen v. Beneficial Loan Corp.* . . . held that *an order relating to the amount of bail to be exacted falls into this category.*"²⁹⁴

The issues to be tried during an extradition hearing center around whether the potential extraditee will be certified for extradition.²⁹⁵ Thus, similar to the bail decision in a domestic criminal case, the bail decision in an international extradition case is independent from the issue to be tried, which is, specifically, whether the accused will be extradited.

Lastly, bail decisions in extradition cases meet the third requirement because the decision to grant bail is effectively unreviewable upon appeal from a final judgment.²⁹⁶ If the government was required to wait until the final decision in an extradition case, it would lose its opportunity to have the potential extraditee, who was released on bail, placed back in custody while awaiting their extradition hearing. The ultimate decision as to whether to certify the extraditee would moot any review of the bail release. Either the potential extraditee would be certified for extradition and ultimately surrendered to the requesting nation, or the potential ex-

289. See BASSIOUNI, *supra* note 23, at 656; see also *Collins*, 259 U.S. at 316 (stating that an extradition hearing decides whether there is competent evidence that would justify holding the accused for trial, and not whether it would suffice for a conviction).

290. 342 U.S. 1, 6 (1951).

291. 337 U.S. 541, 545-47 (1949).

292. *Stack*, 342 U.S. at 12 (Jackson, J.).

293. 354 U.S. 394 (1957).

294. *Id.* at 403 (emphasis added).

295. See *supra* Part I.A.1 for a discussion of the issues to be determined during an extradition hearing.

296. See *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 430-31 (1985) (stating that the reach of the collateral order doctrine is "limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal").

traditee would be released because certification for extradition could not be obtained.²⁹⁷ With either result, the question of whether the potential extraditee was properly released while awaiting his extradition hearing would be moot. Accordingly, review must be had before the extradition hearing or the right to have the bail decision reviewed would be lost forever.²⁹⁸

In *Kirby*, the court turned a blind eye to the collateral order doctrine.²⁹⁹ The majority cited *Iuteri v. Nardoza*³⁰⁰ for the proposition that courts have acted before where explicit statutory grants of power were lacking.³⁰¹ However, in citing *Iuteri* to make the point that courts have acted without explicit jurisdiction, the majority completely overlooked the *Iuteri* court's use of the collateral order doctrine. The *Iuteri* court did not act without jurisdiction. Rather, it reviewed whether the district court's order, which granted an accused bail pending a decision on his petition for a writ of habeas corpus, was an appealable collateral order.³⁰² The majority in

297. See BASSIOUNI, *supra* note 23, at 656 ("In the event that the individual is found to be non-extraditable, the proceedings end."). See *supra* notes 35-39 and accompanying text for a discussion of the procedures remaining after the extradition hearing.

298. See, e.g., *Mitchell v. Forsyth*, 472 U.S. 511, 526-30 (1985) (holding that an order involving qualified immunity is immediately appealable under the collateral order doctrine); *Nixon v. Fitzgerald*, 457 U.S. 731, 748 (1982) (holding that an order involving absolute immunity is immediately appealable under the collateral order doctrine); *United States v. P.H.E., Inc.*, 965 F.2d 848, 853-56 (10th Cir. 1992) (allowing immediate appeal of a denial of a claim of bad faith prosecution because the right not to be tried is lost once tried). *But see* *United States v. MacDonald*, 435 U.S. 850, 858-61 (1978) (holding that order denying a motion to dismiss based on alleged violation of right to a speedy trial was not immediately appealable because review of the order could be had at a later time); *United States v. Jackson*, 30 F.3d 572, 574 (5th Cir. 1994) (denying immediate review of alleged violation of Speedy Trial Act because a dismissal without prejudice is not a final judgment); *United States v. Holub*, 944 F.2d 441, 442 (8th Cir. 1991) (same); *United States v. Buchanan*, 946 F.2d 325, 327 (4th Cir. 1991) (denying review of a motion to dismiss when defendant entered into a plea bargain where further action by the court may be had).

299. The dissent, mirroring the language of the collateral order doctrine, stated that the grant of bail at issue in *Kirby* did not conclusively determin[e] a disputed question. See *United States v. Kirby*, 106 F.3d 855, 866 (9th Cir. 1997) (Noonan, J., dissenting). Nonetheless, the *Kirby* court never explicitly addressed the collateral order doctrine.

300. 662 F.2d 159, 161 (2d Cir. 1981).

301. See *Kirby*, 106 F.3d at 860 n.6.

302. See *Iuteri*, 662 F.2d 159 at 161. Although the *Iuteri* court did not explicitly mention the collateral order doctrine, its language negated the need to mention it explicitly. The *Iuteri* court stated that "[b]ecause the district court's bail order gave petitioner relief which was collateral to the underlying proceeding, and not subject to meaningful review on an appeal from the habeas corpus determination, its order may be treated as final." *Id.*

Kirby could have used the same approach with the result being a much sounder basis for jurisdiction.

Speculating that use of the collateral order doctrine will prove unsatisfactory to the federal judiciary because of its controversial development,³⁰³ an alternative solution to the issue raised in *Kirby* lies in the Supreme Court's rulemaking power.³⁰⁴

D. *The Supreme Court Could Use Its Rule-Making Power to Put an End to the Problem of Defining Finality Through Case Law*

Another possible solution to the jurisdictional issue raised in *Kirby*, short of an explicit statutory amendment³⁰⁵ authorizing the courts of appeals to review grants of bail in international extradition cases, is found in the Supreme Court's rulemaking power.

When 28 U.S.C. § 1292(e) was enacted, Congress provided the Supreme Court with power to "prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d)."³⁰⁶ Thus, as delineated by § 2072 of the Rules Enabling Act, the Supreme Court may use this power to prescribe rules pertaining to procedure in the courts of appeals so long as such rules do not "abridge, enlarge or modify any substantive right."³⁰⁷

In addition, § 2072 was recently amended to state that rules enacted by the Supreme Court "may define when a ruling of a district court is final for purposes of appeal under section 1291 of this title."³⁰⁸ Pursuant to this authority, the Supreme Court may identify specific categories of interlocutory rulings that may be reviewed on interlocutory appeal.³⁰⁹ Congress thereby gave the Supreme Court the power to provide for interlocutory review of orders that

303. See *supra* Part I.C.4.c for a discussion of the development of the collateral order doctrine.

304. See *supra* notes 107-115 and accompanying text for a discussion of the Supreme Court's rulemaking power.

305. In fact, legislation, although unsuccessful, has been proposed to revise the final judgment rule. See H.R. 3152, 100th Cong., 1st Sess., the proposed Court Reform and Access to Justice Act of 1987, Title VII.

306. 28 U.S.C. § 1292(e) (1994).

307. *Id.* § 2072(b).

308. *Id.* § 2072(c), as added by Act of Dec. 1, 1990, Pub. L. No. 101-650, § 315, 104 Stat. 5089, reprinted in 1990 U.S.C.A.N. 5115.

309. See *id.* §§ 2072(c), 1292(e); see also WRIGHT ET AL., *supra* note 54, § 3907, at 283.

are not currently reviewable on interlocutory appeal. The Supreme Court should make use of this power and resolutely lay to rest the problems surrounding the definition of finality.³¹⁰

The Supreme Court may handle the issue in one of two ways. The Court could prescribe rules that specifically enumerate which categories of decisions are appealable, or, it could attempt yet again to define "finality." Arguably, based on the lengthy discussion in this Note concerning the problems with defining finality satisfactorily, the more practical solution would be for the Supreme Court to use its rulemaking power to specifically identify those decisions that are immediately appealable.³¹¹

CONCLUSION

The issue of whether the courts of appeals may review grants of bail given by district court judges in international extradition matters is, as evidenced by this Note, extremely complex. Nonetheless, the issue lends itself to rather simple solutions. Rather than arguing that bail decisions are final decisions so as to invoke the jurisdiction provided by § 1291, courts of appeals can rely on the collateral order doctrine to confer jurisdiction to review these grants of bail. Alternatively, the Supreme Court could use its rulemaking power to define a final decision once and for all. The Supreme Court may use this power either to define finality or, more wisely, to delineate those categories of decisions that are immediately appealable. The only remaining question is whether it will be the United States Supreme Court or the United States Courts of Appeals that will appropriately define the basis of jurisdiction to undertake appellate review of grants of bail made by district court judges in international extradition cases.

Gina Barry

310. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, Part II at 95 (Apr. 2, 1990) ("Decisional doctrines—such as 'practical finality' and especially the 'collateral order rule'—blur the edges of the finality principle, require repeated attention from the Supreme Court, and may in some circumstances restrict too sharply the opportunity for interlocutory review.").

311. Cf. David D. Siegel, *Changes in Federal Jurisdiction and Practice Under the New (Dec. 1, 1990) Judicial Improvements Act*, 133 F.R.D. 61, 80 (1991) ("Until the rules are in place pursuant to this new subdivision, the case law will apparently continue to determine finality under § 1291.").